DOCKET

No. 08-146
Title: Arthur Andersen LLP, et al., Petitioners
v.
Wayne Carlisle, et al.
Docketed: August 5, 2008
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (06-5290)
Decision Date: April 9, 2008
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jun 23 2008	Application (07A1031) to extend the time to file a petition for a writ of certiorari from July 8, 2008 to August 7, 2008, submitted to Justice Stevens.
Jun 24 2008	Application (07A1031) granted by Justice Stevens extending the time to file until August 7, 2008.
Aug 4 2008	Petition for a writ of certiorari filed. (Response due September 4, 2008)
Aug 26 2008	Order extending time to file response to petition to and including October 6, 2008.
Oct 6 2008	Brief of respondents Wayne Carlisle, et al. in opposition filed.
Oct 21 2008	Reply of petitioners Arthur Andersen LLP, et al. filed. (Distributed)
Oct 22 2008	DISTRIBUTED for Conference of November 7, 2008.
Oct 22 2008	Supplemental brief of petitioners filed. (Distributed)
Nov 7 2008	Petition GRANTED.
Dec 3 2008	Consent to the filing of all amicus briefs, in support of either party or neither party, received from counsel for the petitioners.
Dec 8 2008	SET FOR ARGUMENT ON Tuesday, March 3, 2009.
Dec 15 2008	Joint appendix filed. (Statement of costs filed)
Dec 18 2008	Record received from the U.S.C.A. for the 6th Circuit. (1 box)
Dec 22 2008	Brief of petitioners Arthur Andersen LLP, et al. filed.
Dec 29 2008	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Dec 29 2008	Brief amicus curiae of Washington Legal Foundation filed.
Jan 9 2009	CIRCULATED.
Jan 15 2009	The time within which to file respondents' brief on the merits is extended to and including January 23, 2009.
Jan 22 2009	Record for the U.S.D.C. for the Eastern District of Kentucky is electronically fied.
Jan 23 2009	Brief of respondents Wayne Carlisle, et al. filed. (Distributed)
Feb 20 2009	Reply of petitioners Arthur Andersen LLP, et al. filed. (Distributed)
Mar 3 2009	Argued. For petitioners: M. Miller Baker, Washington, D.C. For respondents: Paul M. De Marco, Cincinnati, Ohio.

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PETITION FOR WRIT OF CERTIORARI

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IN THE
Supreme Court of the United States

ARTHUR ANDERSEN, LLP, ET AL.,
Petitioners,

v.

WAYNE CARLISLE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3, provides that "on application of one of the parties," a district court shall stay proceedings pending arbitration if the district court concludes that the "issue involved in such suit or proceeding is referable to arbitration" under "an agreement in writing for such arbitration." Section 16(a)(1)(A) of the FAA, 9 U.S.C. § 16(a)(1)(A), provides that "an appeal may be taken from an order" of a district court denying a stay application made under Section 3. The questions presented are:

(1) Whether Section 16(a)(1)(A) of the FAA provides appellate jurisdiction over an appeal from an order denying an application made under Section 3 to stay claims involving non-signatories to the arbitration agreement.

(2) Whether Section 3 of the FAA allows a district court to stay claims against non-signatories to an arbitration agreement when the non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel.

PARTIES TO THE PROCEEDING

The parties to this proceeding are the same as the parties to the proceeding in the United States Court of Appeals for the Sixth Circuit: petitioners Arthur Andersen LLP, Curtis, Mallet-Prevost, Colt & Mosle LLP, William L. Bricker, Jr., Integrated Capital Associates, Inc., Intercontinental Pacific Group, Inc., and Prism Connectivity Ventures; and respondents Wayne Carlisle, James E. Bushman, Gary L. Strassel, WC Thomas, LLC, WC Venture Corp., the Ohio 1999 Irrevocable ESBT of Wayne Carlisle, JB Cinoh, LLC, JEB Venture Corp., JEB Revocable ESBT, Wayne Carlisle, Trustee, GS Noky, LLC, and WJC Strategic Investments, LLC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioners are subsidiaries of a publicly-owned corporation, and no publicly-owned corporation has a financial interest in the outcome of these proceedings.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

RELEVANT STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 9

I. The Courts of Appeals Are Intractably Divided Over Whether Section 16(a)(1)(A) Provides Appellate Jurisdiction Over Appeals From Denials of Section 3 Motions Involving Non-Signatories 12

II. The Courts of Appeals Are Also Deeply Divided Over Whether Section 3 Applies When Non-Signatories Can Otherwise Enforce the Arbitration Agreement Under Principles of Contract and Agency Law, Including Equitable Estoppel 21

III. The Questions Presented Are Recurring, Important and Should Be Resolved by This Court 26

IV. The Sixth Circuit Decision Is Erroneous As to Appellate Jurisdiction Under Section 16(a)(1)(A) 27

V. The Sixth Circuit Decision Is Erroneous As to the Merits of Section 3 30

CONCLUSION 34

APPENDIX A: Opinion of the United States Court of Appeals for the Sixth Circuit 1a

APPENDIX B: Excerpted Transcript of Preliminary Pretrial Conference Before David L. Bunning, United States District Court Judge 13a

APPENDIX C: Order of the United States District Court, Eastern District of Kentucky at Covington 17a

TABLE OF AUTHORITIES

CASES

Adams v. Georgia Gulf Corp.,
237 F.3d 538 (5th Cir. 2001) 16, 25
Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.,
524 F.3d 1235 (11th Cir. 2008) 20
AgGrow Oils, LLC v. Nat'l Union Fire Ins. Co.,
242 F.3d 777 (8th Cir. 2001) 10, 18, 23
Anderson v. Corinthian Colls., Inc.,
No. C06-6157, 2006 U.S. Dist. LEXIS 57698 (W.D. Wash. Aug. 16, 2006) 26
Behrens v. Pelletier,
516 U.S. 299 (1996) 29
Blinco v. Green Tree Servicing, LLC,
366 F.3d 1249 (11th Cir. 2004) 18, 23, 29
Blumenthal-Kahn Elec. Ltd. P'ship v. Am. Home Assurance Co.,
236 F. Supp. 2d 575 (E.D. Va. 2002) 26
Bradford-Scott Data Corp. v. Physician Computer Network, Inc.,
128 F.3d 504 (7th Cir. 1997) 28, 29
Campbell v. Gen. Dynamics Gov't Sys. Corp.,
407 F.3d 546 (1st Cir. 2005) 31
Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP,
521 F.3d 597 (6th Cir. 2008) 1
Citrus Mktg. Bd. of Israel v. J. Lauritzen A/S,
943 F.2d 220 (2d Cir. 1991) 10
Comer v. Micor, Inc.,
436 F.3d 1098 (9th Cir. 2006) 23, 33, 34
Chew v. KPMG, LLP,
407 F. Supp. 2d 790 (S.D. Miss. 2006) 26

Denney v. Jenkens & Gilchrist,
412 F. Supp. 2d 293 (S.D.N.Y. 2005) 26
DSMC Inc. v. Convera Corp.,
349 F.3d 679 (D.C. Cir. 2003) ..... *passim*
E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.,
269 F.3d 187 (3d Cir. 2001) 24
EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 29
Ehleiter v. Grapetree Shores, Inc.,
482 F.3d 207 (3d Cir. 2007) 14, 19, 20, 28
First Options v. Kaplan,
514 U.S. 938 (1995) 31
Fisser v. Int'l Bank,
282 F.2d 231 (2d Cir. 1960) 32, 33
Green Tree Fin. Corp.-Ala. v. Randolph,
531 U.S. 79 (2000) 27
Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1988) 28
Hill v. GE Power Sys.,
282 F.3d 343 (5th Cir. 2002) 14, 15
Hoffman v. Deloitte & Touche, LLP,
143 F. Supp. 2d 995 (N.D. Ill. 2001) 26
IDS Life Ins. Co. v. SunAmerica, Inc.,
103 F.3d 524 (7th Cir. 1996) 16, 17, 25
In re Talbott Big Foot, Inc.,
887 F.2d 611 (5th Cir. 1989) 25
In re Universal Serv. Fund Tel. Billing Practice Litig.,
428 F.3d 940 (10th Cir. 2005) ..... *passim*
Invista N. Am. S.a.r.l. v. Rhodia Polyamide Intermediates S.A.S.,
503 F. Supp. 2d 195 (D.D.C. 2007) 10, 11, 22
Long v. Silver,
248 F.3d 309 (4th Cir. 2001) 18, 23

May v. Higbee Co.,
372 F.3d 757 (5th Cir. 2004) 16
McCarthy v. Azure,
22 F.3d 351 (1st Cir. 1994) 18, 22
Morrie Mages & Shirley Mages Found. v. Thrifty Corp.,
916 F.2d 402 (7th Cir. 1990) 25
Nakamura Trading Co. v. Sankyo Corp.,
No. 05 CV 7205, 2006 U.S. Dist. LEXIS 26301 (N.D. Ill. Apr. 19, 2006) 26
Nederlandse Erts-Tankersmattschappij, N.V. v. Isbrandtsen Co.,
339 F.2d 440 (2d Cir. 1964) 24
Omni Tech Corp. v. MPC Solutions Sales, LLC,
432 F.3d 797 (7th Cir. 2005) 20, 28
Restoration Pres. Masonry, Inc. v. Grove Europe Ltd.,
325 F.3d 54 (1st Cir. 2003) 23
Ross v. Am. Express Co.,
478 F.3d 96 (2d Cir. 2007) ..... *passim*
Sierra Rutile Ltd. v. Katz,
937 F.2d 743 (2d Cir. 1991) 15, 24
Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.,
526 F.3d 38 (1st Cir. 2008) 10, 17
Telecom Italia, SPA v. Wholesale Telecom Corp.,
248 F.3d 1109 (11th Cir. 2001) 20, 28
Thomson-CSF, S.A. v. Am. Arbitration Ass'n,
64 F.3d 773 (2d Cir. 1995) 33
Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A.,
372 F.3d 339 (5th Cir. 2004) 14, 19, 25

STATUTES

9 U.S.C. § 1 *et seq.* 2
9 U.S.C. § 3 ..... *passim*
9 U.S.C. § 4 ..... 3, 8, 13, 21
9 U.S.C. § 16(a)(1)(A) ..... *passim*
9 U.S.C. § 16(a)(1)(B) 3
9 U.S.C. § 16(b) 28, 29

OTHER AUTHORITIES

1 OEHMKE COMMERCIAL ARBITRATION § 11:1 (3d ed. 2005) 33
DOMKE ON COMMERCIAL ARBITRATION § 13:1 (3d ed. 2008) 33

PETITION FOR A WRIT OF CERTIORARI

Petitioners Arthur Andersen LLP, Integrated Capital Associates, Intercontinental Pacific Group, Inc., Prism Connectivity Ventures, LLC, Curtis, Mallet-Prevost, Colt & Mosle, LLP, and William L. Bricker, Jr. respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is available at *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, 521 F.3d 597 (6th Cir. 2008) and is reprinted at Pet. App. 1a-12a. The district court's findings of fact and law made from the bench on February 3, 2006, are reprinted at Pet. App. 13a-16a. The district court's order denying petitioners' Section 3 motions is reprinted at Pet. App. 17a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit entered its judgment and opinion on April 9, 2008. On June 24, 2008, Justice Stevens granted petitioners' application to extend the time to file a petition for writ of certiorari until August 7, 2008. Supreme Court Dkt. No. 07A1031. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

9 U.S.C. § 3 provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 16 provides in pertinent part:

> (a) An appeal may be taken from—
>
> (1) an order—
>
> (A) refusing a stay of any action under section 3 of this title[.]

STATEMENT OF THE CASE

1. This case concerns the applicability of certain provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, in cases involving non-signatories to the relevant arbitration agreement. Section 3 of the FAA, 9 U.S.C. § 3, provides that "on application of one of the parties," a district court shall stay proceedings pending arbitration if the district court

concludes that the "issue involved in such suit or proceeding is referable to arbitration" under "an agreement in writing for such arbitration."[1]

In 1988, Congress amended the FAA to expressly provide a right of immediate interlocutory appeal of orders denying motions[2] to stay under Section 3. Pub. L. No. 100-72, tit. X, § 1019(a), 102 Stat. 4671, § 15 (1988), renumbered § 16, Pub. L. 101–650, tit. III, § 325(a)(1), 104 Stat. 5120 (1990), codified at 9 U.S.C. § 16(a)(1)(A). Section 16(a)(1)(A) provides that an immediate interlocutory appeal can be taken from an order "refusing a stay of any action under section 3 of this title." 9 U.S.C. § 16(a)(1)(A).[3]

2. In 1999, Bricolage Capital, LLC ("Bricolage") and certain petitioners provided tax advice to respondents Wayne Carlisle, James Bushman, and Gary Strassel concerning strategies to minimize liability for capital gains. Pet. App. 3a. To implement this advice, Carlisle, Bushman, and Strassel created several limited liability corporations ("LLCs"), which are also respondents. The LLCs in turn entered into investment management

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[1] A companion provision of the FAA not at issue in this case, Section 4, similarly allows a district court to compel arbitration. *See* 9 U.S.C. § 4. Courts generally interpret Sections 3 and 4 in tandem.

[2] Although Section 3 refers to "application[s]" to stay and Section 4 refers to "petition[s]" to compel, for ease of reference petitioners hereinafter refer to all such filings as "motions" to stay or compel under the FAA.

[3] The 1988 amendment similarly allows for an immediate interlocutory appeal of a denial of a motion to compel arbitration under Section 4. *See* 9 U.S.C. § 16(a)(1)(B).

agreements with Bricolage. Pet. App. 3a. All of the agreements contained the following arbitration clause: "Any controversy arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration conducted in New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association." Pet. App. 3a-4a. Petitioners were not signatories to the investment management agreements containing this arbitration clause. Pet. App. 3a.

3. In 2005, respondents brought this action against Bricolage and petitioners in the Eastern District of Kentucky. Pet. App. 4a. Respondents sought to recover damages for investment losses and tax liabilities allegedly incurred as a result of the tax advice and accompanying transaction with Bricolage and petitioners.

Bricolage and petitioners filed motions to stay the district court proceedings pursuant to Section 3 of the FAA.[4] Pet. App. 4a-5a. In these motions,

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[4] Petitioners Arthur Andersen LLP, Curtis, Mallet-Prevost, Colt & Mosle, LLP, and William L. Bricker, Jr. filed motions to stay under Section 3 of the FAA. *See* Motion to Stay Proceedings Pending Arbitration at 1, *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, No. 05-59, dkt. 31 (E.D. Ky. June 10, 2005) (Andersen Motion); No. 05-59, dkt. 93 (E.D. Ky. Feb. 17, 2006) (Curtis, Mallet/Bricker Motion). Petitioners Prism Connectivity Ventures, LLC, Integrated Capital Associates, and Intercontinental Pacific Group filed a joinder to these motions. No. 05-59, dkt. 65 and 66 (E.D. Ky. Aug. 26, 2005).

petitioners argued that, under principles of equitable estoppel, the district court should stay respondents' claims against them until those claims were arbitrated pursuant to the terms of the arbitration clause contained in the agreements between respondents and Bricolage. As petitioners argued, equitable estoppel required the arbitration of respondents' claims against them because respondents' claims fell within the scope of the arbitration clause and alleged substantially interdependent and concerted misconduct by both the signatory (Bricolage) and the non-signatories (petitioners) to the agreements containing the arbitration clause.[5]

The district court denied petitioners' motions to stay under Section 3 on the basis that petitioners did not satisfy the requirements of equitable estoppel and thus could not enforce the arbitration agreement, and that respondents' claims did not fall within the scope of the arbitration agreement.[6] Pet. App. 16a. Petitioners timely appealed this order to the Sixth Circuit pursuant to Section 16(a)(1)(A) of the FAA.

4. In full merits briefing and oral argument before the Sixth Circuit, petitioners argued that the district court erred by not staying respondents'

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[5] Hereinafter, the arbitration clause in the agreements between respondents and Bricolage is referred to as the "arbitration agreement."

[6] The district court also denied as moot Bricolage's motion to stay under Section 3 because Bricolage filed for bankruptcy while its motion was pending.

claims against them under Section 3 because (1) respondents' claims were within the scope of the arbitration agreement, and (2) petitioners could enforce the arbitration agreement under equitable estoppel principles. The Sixth Circuit, however, never considered these issues. Instead, the Sixth Circuit dismissed petitioners' appeal for lack of appellate jurisdiction under Section 16(a)(1)(A). Pet. App. 12a.

At the outset, the Sixth Circuit noted that whether Section 16(a)(1)(A) confers appellate jurisdiction over appeals from denials of Section 3 motions to stay claims involving non-signatories has "been addressed under similar circumstances in at least three of our sister circuits, resulting in a circuit split." Pet. App. 5a.[7] On one side of the split, rejecting appellate jurisdiction over denials of Section 3 motions to stay claims involving non-signatories to the arbitration agreement, the Sixth Circuit identified *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003) and *In re Universal Service Fund Telephone Billing Practice Litigation*, 428 F.3d 940 (10th Cir. 2005). *See* Pet. App. 7a. On the other side of the split, upholding appellate jurisdiction

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[7] In passing, the Sixth Circuit erroneously asserted that petitioners had not actually invoked Section 3 in the district court. *See* Pet App. 5a ("The defendants now seek appellate review of that denial, for the first time invoking Section 3 of the Federal Arbitration Act in an effort to establish interlocutory jurisdiction under Section 16 of the Act."). Nevertheless, the Sixth Circuit decided the case as if petitioners had invoked Section 3 in the district court, which in fact petitioners expressly did. *See* note 4, *supra*.

over denials of Section 3 motions to stay claims involving non-signatories to the arbitration agreement, the Sixth Circuit identified *Ross v. American Express Co.*, 478 F.3d 96 (2d Cir. 2007). *See* Pet. App. 7a.

Without elaboration, the Sixth Circuit followed *DSMC* and *Universal Service Fund*: "In the absence of a controlling decision in this circuit, we opt to follow the reasoning and result in [*DSMC* and *Universal Service Fund*]," Pet. App. 7a, and expressly rejected the reasoning of *Ross*: "We find the statutory analysis in *DSMC Inc.* and *Universal Service Fund* superior to the circular reasoning employed by the Second Circuit in *Ross v. American Express Co*," Pet. App. 10a. The Sixth Circuit criticized *Ross* for relying on other circuits that had exercised appellate jurisdiction under Section 16(a)(1)(A) in cases involving non-signatories to an arbitration agreement but that had not explained their rationale for doing so. *See* Pet. App. 10a-11a.

In *DSMC*, the D.C. Circuit (Roberts, J.) determined the issue of appellate jurisdiction under Section 16(a)(1)(A) by expressly deciding the *merits* and holding that, as a matter of law, Section 3 does not apply to claims involving non-signatories to an arbitration agreement. *See DSMC*, 349 F.3d at 685 ("We simply conclude that the mandatory stay provision of Section 3 does not apply to litigation involving parties not subject to a written arbitration

agreement, and therefore hold that this court lacks jurisdiction under Section 16(a)(1)(A).").[8]

In *Universal Service Fund*, the Tenth Circuit followed *DSMC* and held that it lacked appellate jurisdiction over an appeal from denials of Section 3 and 4 motions. The Tenth Circuit limited its analysis, however, almost entirely to the Section 4 motion. The only sentence in the opinion substantively analyzing the Section 3 motion effectively followed *DSMC*: "[W]hether Defendants are appealing from the district court's denial of a stay or its refusal to compel arbitration, the plain language of the applicable jurisdictional statute mandates Defendants' prior reliance upon a *written agreement* to arbitrate as a condition precedent to our jurisdiction." 428 F.3d at 942 (emphasis by the court).

Because the Sixth Circuit in this case adopted the reasoning of *DSMC* and *Universal Service Fund*, and as *Universal Service Fund* followed the reasoning of *DSMC*, the Sixth Circuit decision must be read as holding that, as a matter of law, Section 3 does not allow a district court to stay claims against non-signatories, even if the non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including

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[8] *DSMC* also involved an appeal of a denial of a motion to compel under Section 4, and the D.C. Circuit similarly held that because the Section 4 motion involved a non-signatory, Section 4 did not apply as a matter of law and Section 16(a)(1)(B) did not provide appellate jurisdiction over the appeal from the Section 4 denial. *See* 349 F.3d at 682-84.

equitable estoppel. Put another way, like the D.C. Circuit in *DSMC*, the Sixth Circuit collapsed the jurisdictional analysis under Section 16(a)(1)(A) into the merits of the Section 3 motion.

This reading is confirmed by the first paragraph of the Sixth Circuit decision, which states that "none of the defendants involved in this appeal was a signatory to the written arbitration agreement in question. . . . *In the absence of an applicable written agreement to arbitrate, the plaintiffs contend that Section 3 is inapplicable in this action . . . We agree.*" Pet. App. 2a (emphasis added). Hence, although the Sixth Circuit's decision is ostensibly denominated as a dismissal for lack of *appellate jurisdiction*, in substance it represents the establishment of a categorical rule regarding the merits of motions made by non-signatories under Section 3.

Subsequent to its decision, the Sixth Circuit stayed the mandate pending the filing in this Court of a petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

In the two decades since Congress added Section 16(a)(1)(A) to the FAA, the courts of appeals have sharply divided over the meaning and application of that provision. Even though the language of Section 16(a)(1)(A) permits an immediate appeal of any order denying a Section 3 motion to stay proceedings, the courts of appeals disagree on whether such an appeal is proper when the claim sought to be stayed involves a *non-signatory* to the arbitration agreement.

Several circuits, including the Sixth Circuit in this case, have acknowledged this split. *See Ross*, 478 F.3d at 100 n.2 (recognizing contrary case law in the D.C. and Tenth Circuits, but holding that "we decline to follow them"); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 44 n.6 (1st Cir. 2008) (noting circuit split); Pet. App. 5a (acknowledging the existence of a "circuit split"). The division extends to intra-circuit conflicts in at least two circuits and an internally inconsistent decision in yet another circuit. Compounding this division is the analytical confusion in the circuits over the proper method of interpreting and applying Section 16(a)(1)(A) in the first instance.

The chaos over appellate jurisdiction grows out of an older underlying conflict in the circuits concerning the *merits* of whether Section 3 allows a district court to stay claims against non-signatories when non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel. Two circuits have recognized the split concerning Section 3. *See AgGrow Oils, LLC v. Nat'l Union Fire Ins. Co.*, 242 F.3d 777, 782 n.5 (8th Cir. 2001) (recognizing conflict between Eighth Circuit and Seventh Circuit caselaw over whether non-signatories can invoke Section 3); *Citrus Mktg. Bd. of Israel v. J. Lauritzen A/S*, 943 F.2d 220, 224 n.6 (2d Cir. 1991) (noting that the Seventh Circuit adopted a position initially suggested but later rejected by the Second Circuit). Similarly, in the wake of the D.C. Circuit's decision in *DSMC*, the district court in that circuit has recognized the split. *See, e.g., Invista N. Am. S.a.r.l. v. Rhodia Polyamide Intermediates*

S.A.S., 503 F. Supp. 2d 195, 203 (D.D.C. 2007) (noting circuit conflict on whether non-signatories can invoke Section 4 to compel arbitration and following *DSMC* as binding).[9]

The two circuit conflicts aggravated by the Sixth Circuit decision are widespread and entrenched, and involve important questions concerning the scope of relief provided by the FAA that require this Court's intervention to resolve. To add clarity and consistency where only confusion and conflict now exist, and to restore an interpretation of the FAA that is consistent with its text and purpose, this Court should grant this petition and reverse the decision below, both on the issue of appellate jurisdiction under Section 16(a)(1)(A) and on the merits of whether Section 3 allows a district court to stay claims against non-signatories when non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel.

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[9] *Invista* involved a motion to compel under Section 4, as opposed to a motion to stay under Section 3, but *DSMC*'s holding applies to both Section 3 and Section 4, as *DSMC* involved both motions. *See DSMC*, 349 F.3d at 682-685. Thus, the circuit split recognized in *Invista* for purposes of Section 4 is the same circuit split that exists under Section 3.

I. The Courts of Appeals Are Intractably Divided Over Whether Section 16(a)(1)(A) Provides Appellate Jurisdiction Over Appeals From Denials of Section 3 Motions Involving Non-Signatories

The decision below widens an existing circuit split concerning the scope of appellate jurisdiction conferred by Section 16(a)(1)(A). Three circuits hold that Section 16(a)(1)(A) does not confer appellate jurisdiction over denials of Section 3 motions involving non-signatories. One circuit holds that appellate jurisdiction does exist in such cases. Two more circuits straddle both sides of the divide with unresolved intra-circuit conflicts, but their latest pronouncements place them on the side upholding appellate jurisdiction. Yet another circuit has taken *both* sides of the issue in a single internally inconsistent decision. Four additional circuits have exercised appellate jurisdiction in Section 3 cases involving non-signatories without substantively addressing the issue, but their rationales on the merits of Section 3 (namely, that non-signatories may invoke Section 3) place them in conflict with circuits denying appellate jurisdiction, because those circuits denying appellate jurisdiction do so on the grounds that non-signatories may not invoke Section 3.

To say that the circuits are divided over appellate jurisdiction, however, understates the confusion in the courts of appeals concerning Section

16(a)(1)(A). The circuits are in utter disarray as to the proper method of interpreting and applying that statute. Some circuits—including circuits on *both* sides of the divide—look to the merits of the Section 3 motion to determine whether appellate jurisdiction exists under Section 16(a)(1)(A). Other circuits, however, refrain from any consideration of the merits of the Section 3 motion and limit the inquiry to whether a Section 3 motion was filed and denied.

a. On one side of the divide are the decisions of the D.C. Circuit in *DSMC*, the Tenth Circuit in *Universal Service Fund*, and the decision below of the Sixth Circuit adopting the reasoning of *DSMC* and *Universal Service Fund*. These decisions collapse appellate jurisdiction under Section 16(a)(1)(A) into the merits and hold that appellate jurisdiction does not exist over denials of Section 3 motions involving non-signatories because Section 3 does not apply as a matter of law to such claims, even if the non-signatory can otherwise enforce the arbitration agreement under principles of contract and agency law.

b. On the other side of the divide is the most recent pronouncement of the Second Circuit, the Third Circuit, and the most recent pronouncements of the Fifth Circuit.

The most recent word from the Second Circuit is *Ross*, where the court of appeals found that Section 16 conferred appellate jurisdiction over an appeal of a denial of a non-signatory's motion to stay under Section 3 and motion to compel arbitration under Section 4 of the FAA. Acknowledging its conflict

with the D.C. and Tenth Circuit decisions in *DSMC* and *Universal Service Fund*, *see* 478 F.3d at 100 n.2, the Second Circuit nonetheless held that "when a district court finds that a signatory to a written arbitration agreement is equitably estopped from avoiding arbitration with a non-signatory, the writing requirement of Section 16 of the FAA is met." 478 F.3d at 100 (Winter, J.).

In *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007), the Third Circuit held that Section 16(a)(1)(A) conferred appellate jurisdiction over the denial of a non-signatory's[10] motion under Section 3 of FAA. In doing so, the Third Circuit maintained the analytical distinction between appellate jurisdiction under Section 16(a)(1)(a) and the merits of a Section 3 motion, holding that appellate jurisdiction exists so long as a "prima facie" Section 3 motion is made and denied. *See* 482 F.3d at 212-213.

In the Fifth Circuit's most recent word on this question, *Waste Management, Inc. v. Residuos Industriales Multiquim, S.A.*, 372 F.3d 339 (5th Cir. 2004), the court of appeals held that Section 16(a)(1)(A) conferred appellate jurisdiction over the denial of a non-signatory's Section 3 motion to the extent that the motion was meritorious. *See id.* at 343 (observing that the jurisdictional inquiry was "identical to the substance of this interlocutory appeal"). Similarly, in *Hill v. GE Power Systems*, 282 F.3d 343 (5th Cir. 2002), another panel of the

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[10] In *Ehleiter*, the non-signatory invoking Section 3 claimed to be an "affiliate" of a signatory. *See* 482 F.3d at 213.

Fifth Circuit held that "[b]ecause § 3 is applicable [to non-signatories], we have jurisdiction to hear [the] appeal pursuant to § 16(a)(1) of the FAA." *Id.* at 348.

c. Although the most recent pronouncements of the Second and Fifth Circuits align them with the Third Circuit and place them in conflict with the D.C., Tenth, and Sixth Circuits, both the Second and Fifth Circuits are ridden with unresolved intra-circuit conflicts. The Seventh Circuit is in a class by itself, with a paradoxical panel decision that at once expressly finds and then seemingly rejects appellate jurisdiction.

The Second Circuit's decision in *Ross* upholding appellate jurisdiction under Section 16(a)(1)(A) conflicts with an earlier decision of that court, *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743 (2d Cir. 1991), in which a different panel of that court held that Section 16(a)(1)(A) does not confer appellate jurisdiction over Section 3 motions involving non-signatories because Section 3 does not apply to such claims. *See id.* at 748.[11]

Similarly, the Fifth Circuit's more recent decisions in *Waste Management* and *Hill* conflict

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[11] Ironically, the D.C. Circuit in *DSMC* cited *Katz* to support its holding that Section 16(a)(1)(A) does not confer appellate jurisdiction over Section 3 motions involving non-signatories. *See DSMC*, 349 F.3d at 684. Thus, although the Second Circuit in *Ross* expressed disagreement with *DSMC*, *DSMC* followed the Second Circuit's earlier decision in *Katz*.

with *Adams v. Georgia Gulf Corp.*, 237 F.3d 538 (5th Cir. 2001), where yet another panel of that court held that a non-signatory cannot invoke Section 3 and that "[s]ince § 3 does not apply, § 16 cannot provide us with jurisdiction to hear his appeal." *Id.* at 541; *see also May v. Higbee Co.*, 372 F.3d 757, 762 (5th Cir. 2004) (noting the inconsistency between *Adams* and *Hill* and stating "we have no occasion to resolve any disharmony in our circuit's cases regarding the rights of litigants who are not actually parties to an arbitration agreement").

In *IDS Life Insurance Co. v. SunAmerica, Inc.*, 103 F.3d 524 (7th Cir. 1996) (Posner, J.), the Seventh Circuit held that it had appellate jurisdiction under Section 16(a)(1)(A) over the denial of a motion to stay under Section 3 in a case involving non-signatories to the contract. *See id.* at 527 (holding that the non-signatories to the arbitration agreement "having been denied a stay pending arbitration, have a right to appeal under section 16"); *id.* at 528 ("Our jurisdiction limited to the [non-signatory] defendants' appeal, we turn at last to the merits of that appeal."). In so doing, the Seventh Circuit at least initially maintained the analytical distinction between appellate jurisdiction under Section 16(a)(1)(A) and the merits of Section 3.

Later in the opinion, however, the Seventh Circuit in *IDS* concluded that Section 3 does not apply to claims involving non-signatories and seemingly *rejected* appellate jurisdiction under Section 16(a)(1)(A) on that basis. *See* 103 F.3d at 530 ("We think that section 3 was irrelevant. So their [the non-signatories'] appeal must fail—and for

the additional reason that the denial of a stay pending arbitration is appealable only when the stay was sought 'under section 3 of this title.' 9 U.S.C. § 16(a)(1)(A).").[12] These statements cannot be reconciled with the earlier statements in the opinion that appellate jurisdiction existed over the non-signatories' appeal, *see* 103 F.3d at 527, 528, nor with the opinion's concluding paragraph, which affirmed the district court's judgment *on the merits* as to the non-signatories, but dismissed the appeal as to other parties, *see* 103 F.3d at 530 ("The judgment [as to the non-signatories] is affirmed."). Thus, the most that can be said of *IDS* is that it is internally inconsistent because it seemingly straddles both sides of the divide.

d. The First, Fourth, Eighth, and Eleventh Circuits have not expressly addressed the issue of appellate jurisdiction under Section 16(a)(1)(A) over denials of Section 3 motions involving non-signatories, but nevertheless have exercised appellate jurisdiction in such cases. *See, e.g.*, *Sourcing Unlimited*, 526 F.3d at 44 n.6 (noting that "[s]everal . . . circuits, including our own, have . . . exercised jurisdiction over interlocutory appeals under § 16(a)(1)(A) or (B) where one or more party to the dispute was arguably not a signatory to the

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[12] The D.C. Circuit in *DSMC* cited this passage of *IDS* to support its holding that Section 16(a)(1)(A) does not confer appellate jurisdiction over Section 3 motions to stay claims involving non-signatories. *See DSMC*, 349 F.3d at 684.

written arbitration agreement"); *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994) (non-signatory appeal of denial of a motion to stay under Section 3); *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001) (non-signatory appeal of denial of motion to stay under Section 3 and motion to compel arbitration under Section 4); *AgGrow Oils*, 242 F.3d 777 (non-signatory appeal of denial of motion to stay under Section 3); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249 (11th Cir. 2004) (non-signatories' appeal of denial of motion to stay under Sections 3 and motion to compel arbitration under Section 4).

Although these circuits have not expressly addressed appellate jurisdiction, as more fully discussed *infra* at 22-23, they do hold on the merits that Section 3 allows a district court to stay claims against non-signatories when the non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel. These holdings conflict with the rationale of the D.C., Tenth, and Sixth Circuits for denying appellate jurisdiction under Section 16(1)(A)(1). Thus, the First, Fourth, Eighth, and Eleventh Circuits are effectively aligned with the Third Circuit and the most recent pronouncements of the Second and Fifth Circuits on the issue of appellate jurisdiction under Section 16(1)(A)(1).

c. Compounding the division and confusion concerning appellate jurisdiction under Section 16(a)(1)(A) is the jurisprudential anarchy that reigns with regard to the proper method for interpreting and applying that provision. Every decision that

denies appellate jurisdiction over Section 3 motions involving non-signatories does so based on the merits of the Section 3 motion, holding that, as a matter of law, Section 3 does not apply to claims involving non-signatories to the arbitration agreement. Decisions upholding appellate jurisdiction under Section 16(a)(1)(A), however, do so for wholly inconsistent reasons.

On one hand, the Second and Fifth Circuit decisions upholding appellate jurisdiction look to the merits of the Section 3 motion, and uphold appellate jurisdiction to the extent that a non-signatory can demonstrate a right to enforce the arbitration agreement under equitable estoppel or other principles of contract and agency law. *See Ross*, 478 F.3d at 100; *Waste Mgmt.*, 372 F.3d at 343.

On the other hand, the Third Circuit simply looks to whether a Section 3 motion has been made and denied and eschews any considerations of the merits. *Ehleiter* explains:

> GSI's stay motion in the Superior Court alleged that the claim at issue in that suit was within the scope of a written agreement to arbitrate and claimed entitlement to a stay mandated by Section 3. Its motion thus alleged a prima facie case of entitlement to a Section 3 stay. That motion was denied. It follows, from a literal reading of Section 16(a)(1)(A) and our interpretative case law, we conclude, that that section conferred jurisdiction on

> the Appellate Division to review the Superior Court's denial of a stay.

482 F.3d at 212.

The test for appellate jurisdiction articulated in *Ehleiter* is consistent with other decisions interpreting Section 16(a)(1)(A) in cases involving only signatories. In *Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797 (7th Cir. 2005) (Easterbrook, J.), the Seventh Circuit explained: "Appellate jurisdiction under § 16(a)(1)(A) depends on the existence (and denial) of a motion for stay pending arbitration, *not on the movant being correct.* If a § 3 motion is made and denied, then appellate jurisdiction exists to determine whether the denial was proper." *Id.* at 800 (emphasis added); *see also Telecom Italia, SPA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1114 (11th Cir. 2001) (rejecting merits-based argument that appellate jurisdiction was absent over denial of Section 3 motion, holding that a merits analysis "confuses the reason for the District Court's ruling against arbitration with the appealability of the ruling. Whether or not the District Court was correct in ruling against arbitration, *its ruling denied a requested stay of the action pending arbitration and was for that reason appealable*") (emphasis added).

In a variation on the same theme, a different panel of the Eleventh Circuit held that, as long as the Section 3 motion is non-frivolous, appellate jurisdiction exists under Section 16(a)(1)(A). *See Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1238 (11th Cir. 2008) ("That

Thione might not be entitled to a § 3 stay on the merits hardly means it did not request one . . . . Because Thione made a non-frivolous motion for a stay pending arbitration and that motion was denied, we have jurisdiction.").

II. The Courts of Appeals Are Also Deeply Divided Over Whether Section 3 Applies When Non-Signatories Can Otherwise Enforce the Arbitration Agreement Under Principles of Contract and Agency Law, Including Equitable Estoppel

The circuit split involving appellate jurisdiction under Section 16(a)(1)(A) has its origins in an older circuit split involving the merits of Section 3. Three circuits now hold that, as a matter of law, Section 3 does not apply to claims involving non-signatories, even if the non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel. Five circuits, on the other hand, recognize that if non-signatories can otherwise enforce the relevant arbitration agreement under principles of contract and agency law, Section 3 allows a district court to stay claims against the non-signatories. Yet another circuit has applied the same principle in the context of Section 4, and its rationale applies with equal force in the context of Section 3. Finally, three other circuits are ridden with lingering unresolved intra-circuit conflicts on this issue.

a. On one side of the Section 3 divide are the D.C., Tenth, and Sixth Circuits, which hold that

Section 3 does not apply as a matter of law to claims involving non-signatories. *See DSMC*, 349 F.3d at 685 ("We simply conclude that the mandatory stay provision of Section 3 does not apply to litigation involving parties not subject to a written arbitration agreement, and therefore hold that this court lacks jurisdiction under Section 16(a)(1)(A)."); [13] *Universal Serv. Fund*, 428 F.3d at 942 ("[W]hether Defendants are appealing from the district court's denial of a stay or its refusal to compel arbitration, the plain language of the applicable jurisdictional statute mandates Defendants' prior reliance upon a *written agreement* to arbitrate as a condition precedent to our jurisdiction."); Pet. App. 2a ("[N]one of the defendants involved in this appeal was a signatory to the written arbitration agreement in question. . . . In the absence of an applicable written agreement to arbitrate, the plaintiffs contend that Section 3 is inapplicable in this action . . . . We agree.").

b. On the other side of the Section 3 divide, the First, Fourth, Eighth, Ninth, and Eleventh Circuits recognize that Section 3 applies to claims involving non-signatories when non-signatories can establish that they can enforce the arbitration agreement under principles of contract and agency law. *See McCarthy*, 22 F.3d at 356, ("[T]he law recognizes certain contract and agency principles under which nonsignatories sometimes can be obligated by, or benefit from, agreements signed by others, and these principles can apply to arbitration provisions. Thus,

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[13] The district court in the D.C. Circuit reads *DSMC* as having decided the merits. *See Invista N. Am.*, 503 F. Supp. 2d at 203.

appellant's failure to sign the Purchase Agreement individually does not in and of itself settle the somewhat different question of whether he can invoke [for purposes of Section 3] the arbitration clause contained therein."); *Restoration Pres. Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 62 n.2 (1st Cir. 2003) (for purposes of motions to stay under Section 3 or compel under Section 4, "[a] non-signatory may be bound by or acquire rights under an arbitration agreement under ordinary state-law principles of agency or contract"); *Long*, 248 F.3d at 320 (for purposes of a motion to stay under Section 3 and motion to compel under Section 4, "[a] non-signatory may invoke an arbitration clause under ordinary state-law principles of agency or contract"); *AgGrow Oils*, 242 F.3d at 780, 782 n.5 (whether non-signatory could invoke Section 3 turned on "ordinary state law contract principles" and noting that its cases hold that "9 U.S.C. § 3 authorizes a stay in favor of a non-party to the arbitration agreement," in conflict with the Seventh Circuit's decision in *IDS*); *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (for purposes of motion to stay under Section 3 and motion to compel under Section 4, "non-signatories can enforce arbitration agreements as third party beneficiaries"); *Blinco*, 400 F.3d at 1312 ("The scope of the Note's arbitration clause is sufficiently broad to allow non-signatories to invoke [for purposes of Sections 3 and 4] the clause where, as here, they face claims derived from the Note.").

c. The Third Circuit has addressed this issue in the context of a motion to compel arbitration under Section 4, and in so doing recognized that non-signatories may be subject to an arbitration

agreement under principles of contract and agency law. *See E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194-95 (3d Cir. 2001) ("Because arbitration is a creature of contract law, when asked to enforce an arbitration agreement against a non-signatory to an arbitration clause, we ask whether he or she is bound by that agreement under traditional principles of contract and agency law."). This rationale applies with equal force to motions to stay under Section 3, so the Third Circuit is effectively aligned with the First, Fourth, Eighth, Ninth, and Eleventh Circuits on the second question presented.

d. The Second, Fifth, and Seventh Circuits straddle both sides of the Section 3 divide with unresolved intra-circuit conflicts. In *Ross*, the Second Circuit held non-signatories may invoke Section 3 under principles of contract law, including equitable estoppel. *See* 478 F.3d at 99 ("[W]e have recognized a number of common law principles of contract law that may allow non-signatories to enforce an arbitration agreement [under Section 3], including equitable estoppel."). *Ross*, however, conflicts with *Nederlandse Erts-Tankersmattschappij, N.V. v. Isbrandtsen Co.*, 339 F.2d 440 (2d Cir. 1964), which held that Section 3 did not permit a stay when the defendants were not signatories to the arbitration agreement. *Id.* at 441. Pre-*Ross* panels of the Second Circuit followed *Nederlandse* and thereby conflict with *Ross*. *See Katz*, 937 F.2d at 748 (following *Nederlandse*); *Lauritzen*, 943 F.2d at 224-25 (reaffirming and following *Nederlandse*).

In *Waste Management,* the Fifth Circuit held that Section 3 does apply when non-signatories can otherwise enforce the arbitration agreement. *See* 372 F.3d at 342 ("A parsing of the language of § 3 demonstrates that, in certain limited circumstances, non-signatories do have the right to ask the court for a *mandatory* stay of the litigation, in favor of pending arbitration to which they are not party.") (emphasis by court). *Waste Management*, however, conflicts with the Fifth Circuit's decisions in *Adams* and *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989), both of which, citing *Nederlandse,* held that Section 3 does not apply to claims involving non-signatories. *See Adams*, 237 F.3d at 540; *Talbott Big Foot*, 887 F.2d at 614.

In *IDS*, the Seventh Circuit followed the Second Circuit's decisions in *Nederlandse* and *Lauritzen,* and the Fifth Circuit's decision in *In re Talbott Big Foot,* and held that Section 3 only applies to claims involving signatories. *See* 103 F.3d at 529 ("Although not expressly so limited, section 3 assumes and the case law holds that the movant for a stay under the arbitration act . . . must be a party to the agreement to arbitrate, as must be the person sought to be stayed."). Although the Seventh Circuit in *IDS* followed *Lauritzen,* the Second Circuit in *Lauritzen* noted its conflict with an earlier Seventh Circuit decision. *See Lauritzen*, 943 F.2d at 224 n.6. (admitting conflict with *Morrie Mages & Shirley Mages Foundation v. Thrifty Corp.*, 916 F.2d 402 (7th Cir. 1990)). In *Thrifty*, the Seventh Circuit held that "Thrifty, as a party to litigation involving issues subject to an arbitration agreement, is entitled to a stay under section 3 of the FAA regardless of its

status as party to the arbitration agreement." 916 F.2d at 407. By following *Lauritzen* rather than its earlier decision in *Thrifty*, the Seventh Circuit in *IDS* created an intra-circuit conflict.

III. The Questions Presented Are Recurring, Important and Should Be Resolved by This Court

The questions presented are plainly recurring, as almost every circuit has spoken at one time or another on these questions. District courts throughout the country regularly grapple with these questions and the confusion generated by the conflicting decisions of the courts of appeals. *Compare Chew v. KPMG, LLP*, 407 F. Supp. 2d 790, 803-04 (S.D. Miss. 2006) (recognizing that a non-signatory may invoke Section 3), *Denney v. Jenkens & Gilchrist*, 412 F. Supp. 2d 293, 297-301 (S.D.N.Y. 2005) (same), *Blumenthal-Kahn Elec. Ltd. P'ship v. Am. Home Assurance Co.*, 236 F. Supp. 2d 575, 581-83 (E.D. Va. 2002) (same), *and Hoffman v. Deloitte & Touche, LLP*, 143 F. Supp. 2d 995, 1004-05 (N.D. Ill. 2001) (same), *with Nakamura Trading Co. v. Sankyo Corp.*, No. 05 CV 7205, 2006 U.S. Dist. LEXIS 26301, at *13 (N.D. Ill. Apr. 19, 2006) *and Anderson v. Corinthian Colls., Inc.*, No. C06-6157, 2006 U.S. Dist. LEXIS 57698, at *5 (W.D. Wash. Aug. 16, 2006) (rejecting non-signatory's attempt to invoke Section 3). Indeed, the questions arise with such frequency that some circuits have had difficulty maintaining the uniformity of their decisions, as evidenced by unresolved intra-circuit splits in the Second, Fifth, and Seventh Circuits.

The questions presented are also important to the smooth functioning of the FAA. An earlier circuit split involving a different aspect of appellate jurisdiction under Section 16 warranted this Court's attention for that reason. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000). On the merits, the Sixth Circuit's interpretation of Section 3 destabilizes the FAA by "drastically alter[ing]" the application of the FAA to cases involving non-signatories. *Ross*, 478 F.3d at 99.

IV. The Sixth Circuit Decision Is Erroneous As to Appellate Jurisdiction Under Section 16(a)(1)(A)

The Sixth Circuit erred by collapsing the merits of petitioners' Section 3 motions into its analysis of appellate jurisdiction, which are entirely different inquiries. All that the text of Section 16(1)(a)(A) requires for appellate jurisdiction is that an appeal be taken from an order denying a motion to stay under Section 3, which is precisely what petitioners did here. In addition, the Sixth Circuit decision is inconsistent with the pro-arbitration structure of the statute and this Court's decisions concerning appellate jurisdiction.

a. Section 16(a)(1)(A) provides that "[a]n appeal may be taken from—(1) an order —(A) refusing a stay of any action under section 3 of this title [.]" 9 U.S.C. § 16(a)(1)(A). On the face of the statute, the *only* requirement for appellate jurisdiction is an order denying a motion for stay brought under Section 3. That simple test is satisfied in this case:

petitioners moved for a stay under Section 3, and the district court denied the motion.

Rather than apply Section 16(a)(1)(A)'s simple jurisdictional test, the Sixth Circuit, like the D.C. Circuit in *DSMC* before it, collapsed the issue of appellate jurisdiction into the merits, asking whether petitioners' motion was properly brought under Section 3. Pet. App. 6a. Nothing in the text of Section 16(a)(1)(A), however, permits consideration (for purposes of appellate jurisdiction) of the merits of a Section 3 motion denied by the district court. *See Omni-Tech*, 432 F.3d at 800; *Ehleiter*, 482 F.3d at 212; *Telecom Italia*, 248 F.3d at 1114.

b. The Sixth Circuit's decision is also in conflict with the purpose of Section 16, which Congress added to the FAA in 1988. The addition of this provision did two things that speak volumes about its purpose. First, it changed the law to provide for immediate interlocutory appeal of denials of motions to compel arbitration or stay proceedings, 9 U.S.C. § 16(a)(1), something that was not permitted at the time, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275, 287 (1988) (holding denial of stays of litigation not appealable). Second, it simultaneously barred interlocutory appeal of all orders granting motions to compel arbitration or stay proceedings. 9 U.S.C. § 16(b)(1)-(2).

Section 16, therefore, demonstrates an undisputed Congressional preference: decisions disfavoring arbitration decisions get an immediate appeal, while those favoring arbitration do not. *See Bradford-Scott Data Corp. v. Physician Computer*

Network, Inc., 128 F.3d 504, 505 (7th Cir. 1997). "By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums." *Blinco*, 366 F.3d at 1251; *see also Bradford-Scott*, 128 F.3d at 506. This right of interlocutory appeal, and the attendant preservation of arbitration rights, is consistent with the FAA's "liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citation omitted).

The rule set forth by the Sixth Circuit flies in the face of the clear congressional purpose behind Section 16. Even though Section 16(a)(1)(A) provides for appellate jurisdiction of decisions adverse to arbitration, the Court of Appeals set forth a categorical rule barring jurisdiction, solely because one of the parties to the case was not a signatory to the arbitration agreement. When Congress wanted to set forth categorical rules barring appeals, it did so clearly and unmistakably. 9 U.S.C. § 16(b)(1)-(4). The Sixth Circuit's decision to create a new category of proscribed appeals is contrary to both the language and purpose of Section 16.

c. By conflating the issue of appellate jurisdiction with the merits of petitioners' Section 3 motions, the Sixth Circuit decision also conflicts with this Court's cases, which teach that appellate jurisdiction does not turn on the merits of the appeal. *See Behrens v. Pelletier*, 516 U.S. 299, 311 (1996) ("In any event, the question before us here—

whether there is jurisdiction over the appeal, as opposed to whether the appeal is frivolous—must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order. Appeal rights cannot depend upon the facts of a particular case.") (citation omitted).

V. The Sixth Circuit Decision Is Erroneous As to the Merits of Section 3

The Sixth Circuit decision that Section 3 does not apply as a matter of law to claims involving non-signatories is erroneous for two reasons. First, the text of Section 3 requires a stay if the district court determines that the claim is "referable to arbitration under such an agreement [in writing]." 9 U.S.C. § 3. Whether a claim against a non-signatory is referable to arbitration depends upon principles of contract and agency law that the Sixth Circuit did not consider. Second, the Sixth Circuit's categorical rule that Section 3 does not apply to claims involving non-signatories, even if the non-signatories can otherwise enforce the relevant arbitration agreement, leads to anomalous results and thwarts the purposes of the FAA.

a. Section 3 provides that, upon finding that "the issue involved in such suit or proceeding is referable to arbitration" under "an agreement in writing for such arbitration," the district court "shall on application of *one of the parties* stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). Although Section 3

plainly requires the existence of "an agreement in writing" to arbitrate, nothing in Section 3 limits the availability of a stay to claims involving *signatories* to the agreement. Instead, Section 3 requires the district court to stay the action upon application of any "part[y]" to the action, provided that "the issue involved in such suit or proceeding is referable to arbitration under such an agreement [in writing]." 9 U.S.C. § 3.

Thus, whether respondents' claims against petitioners are "referable to arbitration under such an agreement" turns on the issues raised by petitioners in the Sixth Circuit: whether respondents' claims fall within the scope of the arbitration agreement, and whether petitioners can enforce the arbitration agreement under equitable estoppel principles. *See Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 552 (1st Cir. 2005) ("A party seeking to stay proceedings under section 3 or to compel arbitration under section 4 must demonstrate that a valid agreement to arbitrate exists, *that the movant is entitled to invoke the arbitration clause*, that the other party is bound by that clause, *and that the claim asserted comes within the clause's scope.*") (emphasis added).

Under this Court's cases, whether a party may enforce (or be bound to) an arbitration agreement is determined not by the FAA, but by reference to ordinary principles of contract law. *See First Options v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss

below) should apply ordinary state-law principles that govern the formation of contracts.").

Almost fifty years ago, the Second Circuit explained why ordinary principles of contract and agency law, and not the FAA, determine whether non-signatories may enforce or be bound to arbitration agreements:

> It is true that under the Act, a[n] ["agreement in writing"] is the *sine qua non* of an enforceable arbitration agreement. 9 U.S.C. §§ 2, 4. It does not follow, however, that under the Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. For the Act contains no built-in Statute of Frauds provision but merely requires that the arbitration provision itself be in writing. Ordinary contract principles determine who is bound by such written provisions and of course parties can become contractually bound absent their signatures. It is not surprising then to find a long series of decisions which recognize that the variety of ways in which a party may become bound by a written arbitration provision is limited only by generally operative principles of contract law.

Fisser v. Int'l Bank, 282 F.2d 231, 233 (2d Cir. 1960) (footnotes omitted).[14] More recently, Judge Kozinski observed for the Ninth Circuit that under "hundreds of years of common law," non-signatories can enforce or be bound by arbitration agreements "under ordinary contract and agency principles." *Comer*, 436 F.3d at 1104 n.10.

Not surprisingly, then, both leading treatises on commercial arbitration recognize that non-signatories may be deemed parties to arbitration agreements by application of contract and agency law principles. *See* DOMKE ON COMMERCIAL ARBITRATION § 13:1, at 13-2 n.2 (3d ed. 2008) ("A non-signatory to a contract may be deemed a party to arbitration under the Federal Arbitration Act through application of contract and agency law principles.") (citation omitted); 1 OEHMKE COMMERCIAL ARBITRATION § 11:1, at 11-2 (3d ed. 2005) (under principles of contract and agency law, "[a] non-signatory can compel arbitration, be ordered to arbitrate, or be bound by the resulting arbitral award . . . ."). Thus, a non-signatory can compel arbitration "when the signatory to the contract containing a [sic] arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." OEHMKE § 11:1, at 11-2. That is precisely the theory that petitioners raised in both the district court and

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[14] *Ross* is a lineal descendant of *Fisser*. *See Ross*, 478 F.3d at 96 (following *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)); *see Thomson-CSF*, 64 F.3d at 776 (following *Fisser*).

the Sixth Circuit as to why they can enforce the arbitration agreement in this case.

In this case, the Sixth Circuit erred by holding, as a matter of law, that Section 3 does not apply to claims involving non-signatories. Section 3 does apply to claims involving non-signatories if the claim sought to be stayed is "referable to arbitration under such an agreement." 9 U.S.C. § 3. Whether such claims are "referable to arbitration under an agreement" turns on principles of contract and agency law never considered by the Sixth Circuit because of its erroneous construction of Section 3.

b. The Sixth Circuit decision is also erroneous because it is contrary to the broader pro-arbitration purposes of the FAA generally and Section 3 specifically. The purpose of Section 3 is to require the stay of claims "referable to arbitration under such agreement." Under the Sixth Circuit's categorical rule, even if claims involving non-signatories are otherwise referable to arbitration under long-standing principles of contract and agency law applicable to the agreement, Section 3 does not apply and non-signatories are left to rely on the district court's discretion, rather than the mandatory language of Section 3. This strange result cannot be the law.

CONCLUSION

With its decision in this case, the Sixth Circuit disregarded the considered views of the leading treatises on commercial arbitration and "hundreds of years of common law," *Comer*, 436 F.3d at 1104 n.10,

took sides in two circuit splits, and drew an arbitrary line—denying non-signatories the right to request a Section 3 stay and appeal the denial of that request under Section 16(a)(1)(A)—without any basis in the language of the statute. Only this Court's intervention can establish uniform application of federal law on these important questions of commercial arbitration. Accordingly, this Court should grant this petition, reverse the court of appeals, both as to appellate jurisdiction under Section 16(a)(1)(A) and the merits of Section 3, and remand with instructions to reverse the district court's denial of petitioners' Section 3 motion if petitioners are able to demonstrate, as they argued below, that (1) respondents' claims are within the scope of the arbitration agreement, and (2) petitioners can enforce the arbitration agreement under equitable estoppel principles.

Dated: August 4, 2008 Respectfully submitted,

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APPENDIX

APPENDIX A
Opinion of the United States Court of Appeals for the Sixth Circuit (filed April 9, 2008)

WAYNE CARLISLE, et al.,
Plaintiffs-Appellees,

v.

CURTIS, MALLET-PREVOST, COLT & MOSLE, LLP, et al.,
Defendants-Appellants.

No. 06-5290

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

521 F.3d 597

November 1, 2007, Argued
April 9, 2008, Decided
April 9, 2008, Filed

For Appellants: Douglas E. Whitney McDERMOTT, WILL & EMERY, LLP, Chicago, Illinois, Russell S. Sayre, TAFT, STETTINIUS & HOSSISTER, LLP, Cincinnati, Ohio, Robert B. Craig, TAFT, STETTINIUS & HOLLISTER, LLP, Covington, Kentucky, Earle Jay Maiman, THOMPSON HINE, LLP, Cincinnati, Ohio, Richard J. Idell, IDELL & SEITEL, LLP, San Francisco, California, Donald L.

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Before: DAUGHTREY and COOK, *Circuit Judges*; VINSON, *District Judge*.[1]

By: Martha Craig Daugherty

JUDGMENT

In this interlocutory appeal, the defendants seek to overturn an order of the district court that denied their motion for a stay pending arbitration of the dispute that brought the parties into court. To establish jurisdiction, they rely on Section 16(a)(1) of the Federal Arbitration Act, 9 U.S.C. § 16(a)(1), which permits interlocutory review of orders denying motions to stay under Section 3 of the Act. *See* 9 U.S.C. § 3. However, none of the defendants involved in this appeal was a signatory to the written arbitration agreement in question. Instead, they based their effort to compel arbitration on a theory of

---

[1] The Honorable C. Roger Vinson, United States District Judge for the Northern District of Florida, sitting by designation.

equitable estoppel, a claim that the district court considered and rejected. In the absence of an applicable written agreement to arbitrate, the plaintiffs contend that Section 3 is inapplicable in this action and, consequently, that we are without jurisdiction to hear this appeal on an interlocutory basis. We agree.

FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying the dispute in this case are not relevant at this stage of the litigation, except as they throw light on the jurisdictional question. Plaintiffs Carlisle, Bushman, and Strassel sold their construction equipment business and sought advice on how to minimize the taxes on their sale from Arthur Andersen, LLP, an accounting firm; Bricolage Capital LLC, a "financial boutique"; and Curtis, Mallet-Prevost, Colt & Mosle, LLP, a law firm. Arthur Andersen, Bricolage Capital, and Curtis Mallet recommended investment in a tax shelter referred to as a "leveraged option strategy," which involved foreign currency exchange options. Following this advice, Carlisle, Bushman, and Strassel each created separate business entities, consisting of limited liability companies, to implement the leveraged option strategy. These LLCs then entered into investment management agreements with Bricolage Capital. Defendants Arthur Andersen and Curtis Mallet were not parties to the management agreements, which contained the following arbitration clause: "Any controversy arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration

conducted in New York, New York, in accordance with the Commercial Arbitration Rules of the American Arbitration Association."

As a condition of participating in the tax shelters, the plaintiffs were required to invest $ 4,350,000 in warrants to purchase stock of unidentified small, high-tech companies. The plaintiffs formed another entity, WJC Strategic Investments, to buy the warrants, which were eventually found to be worthless. The plaintiffs also signed individual retainer agreements with defendant Curtis Mallet, for a fee of $ 100,000 each. The IRS later determined that the "leveraged option strategy" was an abusive tax shelter but offered amnesty to taxpayers who had invested in them, under certain conditions. The defendants did not inform the plaintiffs of these IRS rulings, and the plaintiffs were eventually forced to join an IRS settlement program that required them to pay taxes, penalties, and interest due to federal tax authorities, a sum that exceeded $ 25 million.

Plaintiffs Carlisle, Bushman, Strassel, and their various business entities filed suit against nine defendants, including Arthur Andersen, Bricolage Capital, and Curtis Mallet, alleging fraud, negligence, civil conspiracy between the defendants, and breach of fiduciary duty, among other counts. Relying on the arbitration agreements with the principal plaintiffs, Bricolage Capital filed a motion to stay the proceedings pending arbitration of disputes arising under the management agreements. While that motion was pending, Bricolage Capital notified the court that it had filed a petition in bankruptcy; an automatic stay as to Bricolage

Capital was subsequently entered. The remaining defendants nevertheless sought to step into Bricolage Capital's shoes, seeking their own stay of the proceedings based on their theory that equitable estoppel should prevent the plaintiffs from "avoiding arbitration" under the contracts between Bricolage Capital and the plaintiffs and, as a result, that the arbitration clauses in those agreements should be binding on the plaintiffs as against all defendants. The district court rejected the defendants' equitable-estoppel argument and denied the motion to stay for substantive reasons that need not detain us here, given our determination that we do not have jurisdiction to address the merits of the claims. The defendants now seek appellate review of that denial, for the first time invoking Section 3 of the Federal Arbitration Act in an effort to establish interlocutory jurisdiction under Section 16 of the Act.

DISCUSSION

The jurisdiction question presented by this appeal is one of first impression in this circuit, although it has been addressed under similar circumstances in at least three of our sister circuits, resulting in a circuit split. The issue arises in the context of a very limited statutory exception to the general rule of appellate jurisdiction under 28 U.S.C. § 1291, which gives courts of appeal jurisdiction only over "final decisions" of the district courts. A final decision is, of course, one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229,

233, 65 S. Ct. 631, 89 L. Ed. 911 (1945) (internal citation omitted). A district court's denial of the motion to stay proceedings pending arbitration is -- obviously -- not a final decision, making 28 U.S.C. § 1291 inapplicable. Furthermore, denials of motions to stay proceedings are not appealable as interlocutory orders denying injunctions under 28 U.S.C. § 1292(a)(1). *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988). However, Section 16(a)(1) of the Federal Arbitration Act confers jurisdiction over interlocutory appeals from the denial of a motion to stay (Section 3) or to compel arbitration (Section 4) under the Act.

Section 3, purportedly at issue here, makes available a stay of proceedings based upon "any issue referable to arbitration under *an agreement in writing* for such arbitration." 9 U.S.C. § 3 (emphasis added). The denial of a stay under Section 3 is then subject to interlocutory review under Section 16. The defendants in this case have invoked Section 16 as the basis for appeal, contending that the arbitration provisions in the investment management agreements between the plaintiffs and Bricolage Capital permit them to seek a stay under Section 3 because the action brought by the plaintiffs involves an issue that is referable to arbitration under "an agreement in writing" -- even though the defendants are not signatories to the written agreement in question and are instead seeking to compel arbitration with the signatories to a contract with a third party that is no longer involved in these proceedings. In advancing their equitable-estoppel argument, the defendants rely on a Second Circuit

case, *Ross v. American Express Co.*, 478 F.3d 96, 99 (2d Cir. 2007). However, we find the analysis in *Ross* to be less persuasive than that of two other circuit decisions, *DSMC Inc. v. Convera Corp.*, 358 U.S. App. D.C. 356, 349 F.3d 679 (D.C. Cir. 2003), and *In re Universal Service Fund Telephone Billing Practice Litigation v. Sprint Communications Co., L.P.*, 428 F.3d 940, 944-45 (10th Cir. 2005). In the absence of a controlling decision in this circuit, we opt to follow the reasoning and result in the latter two opinions.

The litigation in *DSMC Inc.* stemmed from a contract between National Geographic Television Library, Inc., and DSMC Inc. for the performance of media archiving for National Geographic. When it became dissatisfied with DSMC's performance, National Geographic hired Convera to do the work instead. *See DSMC Inc.*, 349 F.3d at 681. In a procedurally complicated case, DSMC sued Convera, and National Geographic sought to intervene and stay the proceedings under Section 3, based on pending arbitration between National Geographic and DSMC under their contract. National Geographic claimed that the DSMC/Convera litigation and the DSMC/National Geographic dispute had parallel issues and that, although DSMC and Convera did not have an agreement to arbitrate, DSMC should be equitably estopped under Section 4 from refusing to arbitrate with Convera. The district court denied the motion. *See id.*

On appeal, the D.C. Circuit held that because there was no actual written agreement between DSMC and Convera, there was no jurisdiction to review the district court's decision under Section 4, regardless

of the fact that an equitable estoppel argument could be advanced. As the court noted, "Section 4 does not merely require that there be a written agreement somewhere in the picture . . . [but] that the motion to compel be based on an alleged failure to arbitrate under that written agreement." *See id.* at 683. "Even assuming that the issues involved in the DSMC/Convera litigation and the DSMC/NGTL arbitration are identical, intertwined, closely related, whatever -- a matter of hot dispute -- the litigation may not be stayed under Section 3 because the issues in the litigation are not referable to arbitration under an agreement." *Id.* at 684 (internal quotations omitted). The court therefore rejected Convera's motion to compel, describing it as "an effort to expand DSMC's obligation *beyond* the terms of that written agreement pursuant to principles of equitable estoppel," *id.* at 683 (emphasis in original), and noting that evaluation of a claim of equitable estoppel "would require this court to delve deeply into the merits of a case before even deciding whether we had interlocutory appellate jurisdiction -- an unattractive prospect." *Id.* at 684. Instead, the court emphasized the need for jurisdictional rules that are, "to the extent possible, clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset." *Id.* at 683 (citing *Grubart, Inc. v. Great Lakes Dredge & Dock*, 513 U.S. 527, 547, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995). "Asking whether the parties are signatories to a written agreement to arbitrate satisfies these criteria," the court observed, while "the application of equitable estoppel -- if permitted in this context -- requires a multifactor factual and legal inquiry to determine whether the

issues to be litigated by the non-signatory and signatory are sufficiently intertwined with the issues subject to arbitration." *Id.* at 683-84.

The Tenth Circuit case, *Universal Services Fund*, involved a multi-district class-action antitrust suit filed by telephone customers against defendants Sprint and AT&T, charging them with conspiring between themselves and with MCI Worldcom to violate the Federal Communications Act by passing along to their customers the cost of required contributions to the Universal Services Fund, a federal subsidy for low-income consumers. *See In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1114-15 (D. Kan. 2003). Because MCI Worldcom and its various entities had filed for bankruptcy, the plaintiffs were precluded from naming them as defendants in the litigation. The district court granted the defendants' motions to compel arbitration with various named plaintiffs, under agreements that had been entered when those plaintiffs signed up as residential telephone customers with Sprint and AT&T. The court also forced the plaintiffs to arbitrate their claims against MCI, even though they had not entered a written agreement with MCI and were, therefore, non-signatories to the contracts running between MCI and its residential customers, citing "notions of equity and fairness." *Id.* at 1140. Some months later, the two defendants also sought to compel arbitration of the claims brought by MCI's *business* customers and to stay the proceedings, even though they also had no arbitration agreements with those customers. The district court denied a stay, citing waiver. *See In*

re Universal Serv. Fund Tel. Billing Practices Litig., 320 F. Supp. 2d 1135, 1138 (D. Kan. 2004).

On appeal, the Tenth Circuit left open the possibility that non-signatories might be compelled by principles of equitable estoppel to arbitrate, noting that "[t]he issue in this appeal is not whether [the defendants] have a right to compel arbitration, but whether they have a right to an interlocutory appeal from the denial of a motion seeking to compel arbitration." *In re Universal Serv. Fund Tel Billing Practice Litig.*, 428 F.3d at 945. Embracing the D.C. Circuit's analysis in *DSMC Inc.*, the court dismissed the appeal for lack of jurisdiction under Section 16(a)(1)(A) and (B). *See id.* at 941.

We find the statutory analysis in *DSMC Inc.* and *Universal Service Fund* superior to the circular reasoning employed by the Second Circuit in *Ross v. American Express Co.*, another multi-district antitrust class action, in which credit cardholders sued VISA and MasterCard and their member banks, charging a conspiracy to fix fees for the conversion of foreign currencies. *See Ross*, 478 F.3d at 97. When the plaintiffs filed a second class action suit against American Express (Amex), asserting the same claims, Amex moved to dismiss or to compel arbitration even though it was not a signatory to the arbitration agreements between the two other credit card companies and their customers. *See id.* at 98. The district court denied the motion to compel, citing the plaintiffs' antitrust claim concerning the validity of the arbitration clauses at issue. *See id.* On appeal, the circuit court rejected the plaintiffs' motion to dismiss for lack of jurisdiction under Section

16(a)(1), despite the absence of a written agreement to arbitrate with Amex. The court recognized that "arbitration is strictly a matter of contract" but held that the district court's finding that the claims against the defendant were "'inextricably intertwined' with the [arbitration] agreements . . . meets the writing requirement of the [Federal Arbitration Act]." *Id.* at 99. To bolster this holding, the Second Circuit pointed to other cases, both within and outside the Second Circuit, in which arbitration had been compelled under the Act on the basis of equitable estoppel. *See id.* But in none of those cases does it appear that the appellees raised the issue of appellate jurisdiction to review the question on an interlocutory basis. *See e.g., In re Humana Inc. Managed Care Litig.*, 285 F.3d 971 (11th Cir. 2002) (interlocutory review of arbitration forced on non-signatories on the basis of equitable estoppel, apparently without regard to issues of jurisdiction, in a case pre-dating *DSMC Inc.* and *Universal Service Fund*). As a result, we find the Second Circuit's analysis unpersuasive.

CONCLUSION

For the reasons set out above, we read the plain language of 9 U.S.C. § 16(a)(1) to preclude appellate jurisdiction at this stage of the litigation between the parties, and we therefore DISMISS the appeal and REMAND this case to the district court for further proceedings.

APPENDIX B
Excerpted Transcript of Preliminary Pretrial Conference Before David L. Bunning United States District Court Judge

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WAYNE CARLISLE, et al,
Plaintiff

v.

CURTIS, MALLET-PREVOST COLT & MOSLE, LLP, et al.,
Defendant

Docket No. 05-CV-00059
Covington, Kentucky,
Friday, February 3, 2006 1:00 p.m.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

APPEARANCES

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Court Reporter: Lisa Reed Wiesman, RDR-CRR, Official Court Reporter, 35 W. Fifth Street, P.O. Box 1073, Covington, KY 41012

Proceedings recorded by mechanical stenography, transcribed via computer-aided transcription.

* * * * *

THE COURT: . . . All right. First motions, we have Docket 31 and 35. Arthur Andersen and Curtis, Mallet's motion to compel arbitration and/or to stay pending arbitration.

And I guess the oral motion that was just made here at the podium five seconds ago, in the event the Court were to deny the Rule 12(b)(2) motion as relates to the three California defendants, they join, kind of a tag–along motion as well.

Docket 31, Docket 35, the motions to compel arbitration are going to be denied. Simply put, the Court doesn't think this is a situation where equitable estoppel requires arbitration of plaintiffs' claims against them based upon Bricolage's investment management agreement.

First and foremost, as pointed out, Bricolage is in bankruptcy. They're the signatory. I certainly recognize that there's some case law cited by the defendants that allows for, under an equitable estoppel theory, nonsignatories to be the beneficiary of an arbitration agreement.

To enforce arbitration against the plaintiff in this case for any indirect benefit they derive as nonsignatores to the investment agreement of Bricolage requires that they show plaintiffs' claims against them are founded and intertwined with their obligations under the agreement itself, which the defendants have not been able to do, at least in my estimation.

In resolving Arthur Andersen and Curtis, Mallet's motions to compel arbitration in favor of the plaintiffs, the Court relies on the Sixth Circuit decision Javitch v. First Union Security, 315 F.3d 619 at 629, Sixth Circuit 2003. Also, after reviewing Judge Rice's decision prior to the oral argument this afternoon, I believe that that case, which is cited by the defendants, is distinguishable from the facts here.

While the chain of events and transactions encompasses the investment management agreement, it also encompasses much more than that, including the involvement of the Curtis, Mallet, the legal options given by it, the conditions that the warrants be purchased, which involves setting up this WJG Strategic Investments and buying the warrants from Prism Connectivity, and there are a number of allegations involving the connections and money sharing arrangements between the various defendants.

I simply don't think that this is a situation where an [sic] equity the scope of the arbitration agreement, while it is broad, governs the claims raised in the Complaint. So I am going to deny the motion seeking arbitration. Because the motions seeking referral to arbitration are denied, the Court's further going to be – the pending motions to stay the case pending arbitration, Dockets 31, 35, 65 and 66, are also going to be denied, Madam Clerk.

APPENDIX C
Order of the United States District Court, Eastern District of Kentucky at Covington (filed Feb. 6, 2006)

WAYNE CARLISLE, ET AL.
Plaintiffs

v.

CURTIS, MALLET-PREVOST, COLT & MOSLE, LLP, ET AL.
Defendants

No. 05 39

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY AT COVINGTON

On February 3, 2005, this matter came before the Court for a Preliminary Pretrial Conference. Plaintiffs were represented by James Rubin Cummins, Jean M. Geoppinger, and Stanley M. Chesley. Defendants Curtis, Mallet-Prevost, Colt & Mosle, LLP and William L. Bricker, Jr. were represented by Jeanne M. Bruns, Robert B. Craig, and Russell Stanfield Sayre. Defendant Bricolage Capital, LLC has filed a Chapter 11 bankruptcy action with the United States Bankruptcy Court for the Southern District of New York and is presently unrepresented in this Court.

Defendant Andrew D. Beer, principal of Bricolage Capital, LLC, was represented by Kevin L. Murphy and Lynda M. Hils. Defendant Arthur Andersen LLP was represented by Douglas E. Whitney, Jocelyn Francoeur, and Earle Jay Maiman. Defendants, Integrated Capital Associates, Inc., Intercontinental Pacific Group, Inc., and Prism Connectivity Ventures, LLC were represented by Richard J. Idell, Donald L. Stepner, and Jeffrey A. Stepner. The proceedings were recorded by Official Court Reporter, Lisa Wiesman.

The Court, having reviewed the parties' filings, having heard from counsel, and being sufficiently advised, and for the reasons articulated on the record, ORDERS that:

(A) In light of the October 14, 2005, Chapter 11 bankruptcy case filed by Defendant Bricolage Capital, LLC with the United States Bankruptcy Court for the Southern District of New York, Plaintiffs' claims against said Defendant are hereby stayed pending termination of the automatic stay. Plaintiffs shall file a status report with the Court no later than ten (10) days after termination of the automatic stay or other action in the bankruptcy case bearing upon Plaintiffs' claims against Bricolage Capital, LLC filed in this Court.

(B) As to the pending motions:

(1) Defendant Bricolage Capital, LLC's Motion to Dismiss for Lack of Jurisdiction (Doc. #50) and

Motion to Stay Litigation Pending Arbitration (Doc. #27) are hereby denied as moot, given said Defendant's bankruptcy filing;

(2) Plaintiffs' Motion for Order Setting Oral Argument (Doc. #58) is hereby denied as moot, given that the Court heard counsel's arguments on pending motions at the preliminary pretrial conference;

(3) The Motions to Stay Proceedings Pending Arbitration filed by Defendant Arthur Andersen LLP (Doc. #31); Defendants Curtis, Mallet-Prevost, Colt & Mosle, LLP and William L. Bricker, Jr. (Doc. #35); Defendant Prism Connectivity Ventures, LLC (Doc. #65); and Defendants Integrated Capital Associates, Inc. and Intercontinental Pacific Group (Doc. #66) are hereby denied;

(4) The Motions to Dismiss pursuant to Civil Rule 12(b)(2) for lack of personal jurisdiction filed by Defendant Andrew D. Beer (Doc. #29), Defendant Prism

Connectivity Ventures, LLC (Doc. #39), and Defendants Integrated Capital Associates, Inc. and Intercontinental Pacific Group (Doc. #37) are hereby denied without prejudice, given the Court's ruling permitting limited discovery;

(5) The Motion to Dismiss pursuant to Civil Rule 12(b)(6) for failure to state a claim based upon statute of limitations filed by Defendants Curtis, Mallet-Prevost, Colt & Mosle, LLP and William L. Bricker, Jr.

(Doc. #35) is hereby denied without prejudice, given the Court's ruling permitting limited discovery; and,

(6) The Motion to Dismiss pursuant to Civil Rule 12(b)(6) for failure to state a claim filed by Defendant Andrew D. Beer (Doc. #29) is hereby denied.

(C) As to further proceedings:

(1) Within thirty (30) days hereof, the same being March 8, 2006, Defendants, with the exception of Bricolage Capital, LLC and

Samyak C. Veera, shall file Answers to Plaintiffs' Complaint, preserving any affirmative defenses;

(2) The parties' Civil Rule 26(f) conference and report of planning meeting are hereby waived, given the preliminary pretrial conference conducted by the Court and the Court's rulings on pending matters;

(3) The parties may commence with discovery pursuant to the Federal Rules of Civil Procedure, but limited to the issues of the alleged civil conspiracy asserted against all Defendants and the statute of limitations defense raised by Defendants Curtis, Mallet-Prevost, Colt & Mosle, LLP and William L. Bricker;

(4) Discovery limited to these issues may be taken for a period of six (6) months from the date of the preliminary pretrial conference, the same being August 3, 2006;

(5) Approximately thirty (30) days following the close of limited discovery, Plaintiffs shall file an

Amended Complaint, the same being due no later than September 5, 2006; and,

(6) Within thirty (30) days following Plaintiffs' filing of their Amended Complaint, Defendants may answer or otherwise plead in response thereto.

(D) By separate order entered concurrently herewith, this matter is hereby referred to Magistrate Judge J. Gregory Wehrman to supervise further pretrial and discovery proceedings.

This 6th day of February, 2006.

Signed By:

David L. Bunning DB

United States District Judge

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
OCT 6 - 2008
OFFICE OF THE CLERK

No. 08-146

In The
Supreme Court of the United States

ARTHUR ANDERSEN, LLP, *et al.*,

Petitioners,

v.

WAYNE CARLISLE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

When none of the defendants/appellants signed the contract containing the subject arbitration clause and all of them based their arguments in favor of arbitration solely on equitable estoppel, does a United States court of appeals have jurisdiction under Section 16(a)(1)(A) or Section 16(a)(1)(B) of the Federal Arbitration Act to entertain an interlocutory appeal from the district court's order rejecting that equitable estoppel argument?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no respondents are subsidiaries of a publicly-owned corporation, and no publicly-owned corporation has a financial interest in the outcome of these proceedings.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
STATEMENT OF THE CASE	1
A. Procedural Background	1
B. Relevant Facts	3
REASONS WHY THE WRIT SHOULD BE DENIED	9
CONTRARY TO THE DIRE APPEARANCE OF CIRCUIT CONFUSION THAT DEFENDANTS' PETITION STRAINS TO CREATE, THERE IS NO COMPELLING NEED FOR THIS COURT TO ADDRESS WHETHER THE FEDERAL ARBITRATION ACT PERMITS INTERLOCUTORY APPEALS BY DEFENDANTS WHO, AS NONSIGNATORIES TO ARBITRATION AGREEMENTS, UNSUCCESSFULLY INVOKED EQUITABLE ESTOPPEL PRINCIPLES IN SEEKING A STAY PENDING ARBITRATION	9
CONCLUSION	21

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc., 524 F.3d 1235 (11th Cir. 2008).....11

DSMC Inc. v. Convera Corp., 349 F.3d 679 (D.C. Cir. 2003).....*passim*

Elheiter v. Grapetree Shores, Inc., 482 F.3d 207 (3d Cir. 2007).....12

IDS Life Ins. Co. v. SunAmerica, Inc., 103 F.3d 524 (7th Cir. 1996).....12

In re Universal Service Fund Telephone Billing Practice Litig., 428 F.3d 940 (10th Cir. 2005).....*passim*

Omni Tech Corp. v. MPC Solutions Sales LLC, 432 F.3d 797 (7th Cir. 2005).....11

Ross v. American Express Co., 478 F.3d 96 (2d Cir. 2007).....18, 19

Sierra Rutile Ltd. v. Katz, 937 F.2d 743 (2d Cir. 1991).....12

Telecom Italia, SPA v. Wholesale Telecom Corp., 248 F.3d 1109 (11th Cir. 2001).....11

Toledano v. O'Connor, 501 F.Supp.2d 127 (D.D.C. 2007).....18

Waste Management, Inc. v. Residuos Industriales Multiquim, S.A., 372 F.3d 339 (5th Cir. 2004).....12

Workman v. Bredesen, 486 F.3d 896 (6th Cir. 2007).....18

TABLE OF AUTHORITIES – Continued

Page

STATUTES

9 U.S.C. § 3 ..... *passim*

9 U.S.C. § 16(a)(1) ..... *passim*

RULES

Sup. Ct. R. 10 13

STATEMENT OF THE CASE

A. Procedural Background

On March 25, 2005, plaintiffs Wayne Carlisle, James E. Bushman, and Gary L. Strassel and their various business entities[1] filed suit against nine defendants, including their long-time accountant, auditor, and tax advisor, Arthur Andersen LLP ("Andersen"); their attorneys, Curtis, Mallet-Prevost, Colt & Mosle, LLP ("Curtis"), and one of its partners, William Bricker, Jr. ("Bricker"); their investment account manager, Bricolage Capital, LLC ("Bricolage") and two of its principals; and three entities that sold plaintiffs, or were implicated in the sale of, what turned out to be virtually worthless warrants, Integrated Capital Associates, Inc. ("ICA"), Intercontinental Pacific Group, Inc. ("IPG"), and Prism Connectivity Ventures ("Prism"). The complaint alleged claims for fraud against all defendants, civil conspiracy against all defendants, professional (*i.e.*, legal) malpractice against Curtis, professional malpractice against Andersen, breach of fiduciary duty against Andersen, Curtis and Bricker, and Bricolage and its two principals, and negligence against Andersen, Curtis, and Bricolage.

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[1] The business entities included WJG Strategic Investments, LLC; WC Thomas, LLC; WC Venture Corp.; the Ohio 1999 Irrevocable Trust of Wayne Carlisle; JB Cinoh, LLC; JEB Venture Corp.; the JEB Revocable ESBT, Wayne Carlisle, Trustee; and GS Noky, LLC.

The only defendant that actually signed the agreement containing the arbitration clause was Bricolage. Due to the automatic bankruptcy stay, Bricolage is not taking part in the district court proceedings. Prior to filing its bankruptcy petition, Bricolage moved to compel plaintiffs to arbitrate their claims against it and its two principals. Due to the bankruptcy stay, however, the district court denied Bricolage's motion as moot.

On June 10, 2005, before any appreciable discovery, Andersen filed – and all defendants other than Bricolage joined in – a motion "to stay these proceedings . . . pending the completion of all necessary and related arbitration proceedings." They argued that equitable estoppel prevented plaintiffs from avoiding arbitration of all claims against the nonsignatory defendants. They also argued that, even if the district court would not allow them as nonsignatories to invoke the arbitration clause under equitable estoppel principles, the court still should stay the claims against them, pending the arbitration they anticipated between plaintiffs and Bricolage, the lone signatory defendant. In denying their motion, the district court rejected both arguments.

The nonsignatory defendants filed an interlocutory appeal to the United States Court of Appeals for the Sixth Circuit. After full briefing on the merits, the Sixth Circuit held that it had no jurisdiction to entertain defendants' interlocutory appeal under Section 16(a)(1). Appendix A, p. 10a (relying on the "statutory analysis" in *DSMC Inc. v. Convera Corp.*, 349 F.3d

679, 683-85 (D.C. Cir. 2003) (dismissing interlocutory appeal) and *In re Universal Service Fund Telephone Billing Practice Litig.*, 428 F.3d 940, 942-45 (10th Cir. 2005)).

B. Relevant Facts

In June 1999, Carlisle, Bushman, and Strassel sold their heavy construction equipment business. Prior to the sale, Andersen had served as the company's accountant, auditor, and tax advisor for more than twenty years. After the sale, Carlisle, Bushman, and Strassel began exploring methods of legally minimizing taxes on gains realized from the sale. They consulted with Andersen, which introduced them to Bricolage. Bricolage held itself out as "a financial boutique that developed complex structured transactions for high net worth individuals and private corporations."

Andersen, Bricolage, and Curtis recommended a tax shelter, a leveraged option strategy involving foreign currency exchange options (the "Leveraged Option Strategy"). The Leveraged Option Strategy used a series of steps, involving interests in partnerships, to generate tax losses to offset income from other transactions. In one Leveraged Option Strategy variation,

> a taxpayer purchases and writes options and purports to create a substantial positive basis in a partnership interest by transferring those option positions to a partnership. For

> example, a taxpayer might purchase call options for a cost of $1,000X and simultaneously write offsetting call options, with a slightly higher strike price but the same expiration date, for a premium of slightly less than $1,000X. Those option positions are then transferred to a partnership which, using additional amounts contributed to the partnership, may engage in investment activities. Under the position advanced by the promoters of this arrangement, the taxpayer claims that the basis in the taxpayer's partnership interest is increased by the cost of the purchased call options but is not reduced under [Internal Revenue Code] § 752 as a result of the partnership's assumption of the taxpayer's obligation with respect to the written call options. Therefore, disregarding additional amounts contributed to the partnership, transaction costs, and any income realized and expenses incurred at the partnership level, the taxpayer purports to have a basis in the partnership interest equal to the cost of the purchased call options ($1000X in this example), even though the taxpayer's net economic outlay to acquire the partnership interest and the value of the partnership interest are nominal or zero. On the disposition of the partnership interest, the taxpayer claims a tax loss ($1,000X in this example), even though the taxpayer has incurred no corresponding economic loss.

Curtis held itself out to plaintiffs as independent legal counsel, promising to provide a reliable legal

opinion substantiating the legality and validity of the Leveraged Option Strategy as a viable tax shelter.

Carlisle, Bushman, and Strassel each engaged, through their separate business entities, in Leveraged Option Strategy transactions. Specifically, Carlisle established WC Thomas, LLC, a single-member limited liability company ("WC Thomas"); WC Venture Corp., a corporation; and the Ohio 1999 Irrevocable ESBT of Wayne Carlisle, a trust. Carlisle used these entities to engage in Leveraged Option Strategy transactions. Bushman established JB Cinoh, LLC, a single-member limited liability company ("JB Cinoh"); JEB Venture Corp., a corporation; and the JEB Revocable ESBT, Wayne Carlisle, Trustee, a trust. Bushman used these entities to engage in Leveraged Option Strategy transactions. Strassel established GS Noky, LLC, a single-member limited liability company ("GS Noky"), and utilized it to engage in Leveraged Option Strategy transactions. Carlisle, Bushman, and Strassel also collectively established WJG Strategic Investments, LLC, a limited liability company, as their investment company.

WC Thomas, JB Cinoh, and GS Noky, all plaintiffs in this action, each entered into an Investment Management Agreement ("IMA") with Bricolage. No other plaintiff, nor any defendant before the Court on appeal, was a party to the IMAs, although Carlisle, Bushman, and Strassel signed them in their capacity as managers of WC Thomas, JB Cinoh, and GS Noky, respectively. The IMAs between Bricolage (defined as

"the Manager") and WC Thomas, JB Cinoh, and GS Noky (defined individually as "the Client") recited that "the Client desires to retain the services of the Manager to provide investment management services in respect of all cash, securities and other assets and contracts comprising the investment account ('Account')" established by each Client. Each IMA stated that

> the Client is a sophisticated investor experienced in business and investment matters and receives tax, legal and accounting advice with respect to the Client's investments generally and in respect of the Account from persons other than the Manager.

The IMAs further stated:

> Neither the Manager nor any of its officers, directors, employees or agents shall be liable for any loss, expense, cost or liability arising out of any error in judgment or any action or omission hereunder, including any instruction given to the [bank acting as] Custodian by anyone other than an officer, director, employee or agent of the Manager, unless arising out of their negligence, malfeasance or bad faith.

Finally, each of the three IMAs contained the following arbitration clause:

> Any controversy arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration conducted in New York, New York in accordance with the

> Commercial Arbitration Rules of the American Arbitration Association. . . .

The IMAs contained no language mentioning or imposing responsibilities on any defendant other than Bricolage and its principals. In other words, none of the defendants before this Court had any responsibilities under the IMA.

In June 2000, Curtis sent plaintiffs individual letters purportedly containing the firm's independent opinion as to the propriety of the Leveraged Option Strategy as a tax shelter. In reliance upon these letters and the tax advice provided by Andersen, plaintiffs filed their 1999 income tax returns, on which they claimed capital and ordinary losses from their Leveraged Option Strategy transactions. Unbeknownst to plaintiffs, these were "canned, deceptive prefabricated" form letters, prepared well in advance of Curtis' introduction to plaintiffs and disseminated cookie-cutter style.

As a condition of participating in the Leveraged Option Strategy transaction, Carlisle, Bushman, and Strassel also were required to invest $4,350,000 in certain warrants to purchase stock of unidentified small, high-tech companies. After their Leveraged Option Strategy transactions were complete, Carlisle, Bushman, and Strassel formed the entity WJG Strategic Investments and funded it with $4,350,000. These funds were used to purchase warrants in TelEvoke, Inc. and eCryption Technologies, Inc. from Prism, which warrants previously had been owned by

ICA, an investment banking firm with the same principals as IPG.

Shortly after paying Prism for the virtually worthless warrants, Carlisle, Bushman, and Strassel each signed an individual retainer agreement with Curtis, which billed each of them $100,000 as a retainer for professional services to be rendered. Curtis subsequently instructed them to pay the $100,000 each to IPG, ostensibly to reimburse ICA for its payment of their retainers. Unbeknownst to plaintiffs, ICA and IPG not only were represented by Curtis, but ICA was paying Curtis for tax shelter-related services to be performed for at least five other ICA-related clients.

The Internal Revenue Service later deemed the Leveraged Option Strategy an abusive tax shelter. The IRS offered taxpayers using the Leveraged Option Strategy amnesty, stating that it would waive the accuracy-related penalty for any underpayment of tax attributable to use of a disclosed tax shelter. Despite receiving notice of the IRS's determination regarding the Leveraged Option Strategy and its amnesty offer, Curtis failed to retract, modify, or qualify what it knew or should have known was flawed tax advice. Plaintiffs were forced to enroll in an IRS settlement program, pursuant to which all of their outstanding issues with the IRS were resolved. Under the terms of those agreements, they paid all taxes, penalties and interest due to federal tax authorities, exceeding $25 million in the aggregate.

They also filed amended state tax returns and paid any state taxes and interest owed.

REASONS WHY THE WRIT SHOULD BE DENIED

CONTRARY TO THE DIRE APPEARANCE OF CIRCUIT CONFUSION THAT DEFENDANTS' PETITION STRAINS TO CREATE, THERE IS NO COMPELLING NEED FOR THIS COURT TO ADDRESS WHETHER THE FEDERAL ARBITRATION ACT PERMITS INTERLOCUTORY APPEALS BY DEFENDANTS WHO, AS NONSIGNATORIES TO ARBITRATION AGREEMENTS, UNSUCCESSFULLY INVOKED EQUITABLE ESTOPPEL PRINCIPLES IN SEEKING A STAY PENDING ARBITRATION.

Defendants' prolix petition warns of continued "chaos over appellate jurisdiction" unless the Court accepts this case. It speaks of "sharply" and "intractably divided" circuits "ridden" with "widespread and entrenched" conflicts that have left the federal appellate system in "utter disarray." It asserts that "jurisprudential anarchy . . . reigns" across the land. To create this dire appearance, the petition unfortunately resorts to artifice.

It poses a question – whether nonsignatories in general are entitled to appeal the denial of a stay pending arbitration under Section 3 of the Federal

Arbitration Act ("FAA")[2] – that is far broader than the narrow appealability issue that the parties actually briefed and the Sixth Circuit actually decided. The matter actually briefed and decided below is whether Section 16(a)(1) of the FAA permits ***interlocutory*** appeals by defendants who, as nonsignatories to arbitration agreements, unsuccessfully invoked ***equitable estoppel*** in seeking stays pending arbitration.[3]

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[2] *See* Petition, p. i ("Whether Section 16(a)(1)(A) of the FAA provides appellate jurisdiction over an appeal from an order denying an application made under Section 3 to stay claims involving nonsignatories to the arbitration agreement."). Note that this formulation of the issue does not mention interlocutory appeals.

[3] *See* Defendants' FRAP 28(j) Letter dated Oct. 11, 2007 ("in this case, the writing requirement of [Section 3 of] the FAA is satisfied because the claims against Appellants fall within the scope of a written agreement that Appellants are invoking pursuant to the principles of equitable estoppel"); Plaintiffs' FRAP 28(j) Response dated October 29, 2007 ("Section 16(a)(1) permits interlocutory appeals from orders refusing to stay 'any action under section 3'. . . . " Section 3's reach is limited to issues 'referable to arbitration under an agreement in writing'. . . . Nonsignatories lack what §§ 3 and 4 both require – a written agreement – precisely the reason nonsignatories invoke equitable principles instead. . . . [B]ecause § 16(a)(1) permits interlocutory appeals from orders rejecting stays or arbitration 'under' § 3 or 4, orders instead rejecting nonsignatories' 'equitable estoppel' arguments cannot trigger interlocutory appeals."); Sixth Circuit Opinion, Appendix A, 2a-3a ("To establish jurisdiction, [defendants] rely on Section 16(a)(1) of the Federal Arbitration Act, 9 U.S.C. § 16(a)(1), which permits interlocutory review of orders denying motions to stay under Section 3 of the Act. *See* 9 U.S.C. § 3. However, none of the defendants involved in this appeal was a signatory to the written arbitration agreement in question. Instead, they based their effort to compel arbitration on a theory

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Having disingenuously posed a broader issue than this case truly involves, the petition rattles off a litany of circuit decisions that have no bearing on the specific statutory interpretation issue that the parties actually briefed and the Sixth Circuit actually decided. It is as if defendants consciously set out to assemble an apparently confusing menagerie of cases with criss-crossing fact patterns and varying results, and then proceeded to frame a question broad enough to encompass all of them. Voilà, instant "chaos" and "anarchy" in the federal appellate system!

Never mind that defendants waste words expounding on court of appeals decisions that could not possibly reflect any relevant circuit split, because they lack the key features of this case – nonsignatory defendants filing interlocutory appeals from denials of stay/arbitration motions that had been based on equitable estoppel.[4] This is true, for example, of the

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of equitable estoppel, a claim that the district court considered and rejected. In the absence of an applicable written agreement to arbitrate, the plaintiffs contend that Section 3 is inapplicable in this action and, consequently, that we are without jurisdiction to hear this appeal on an interlocutory basis. We agree.").

[4] *See, e.g.*, *Telecom Italia, SPA v. Wholesale Telecom Corp.*, 248 F.3d 1109 (11th Cir. 2001) (dispute between two signatories as to the arbitrability of a claim, so defendant did not invoke equitable estoppel); *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235 (11th Cir. 2008) (dispute between two signatories as to the interpretation of their arbitration clause, so defendant did not invoke equitable estoppel); *Omni Tech Corp. v. MPC Solutions Sales LLC*, 432 F.3d 797 (7th Cir. 2005) (dispute between two signatories as to the definition of "arbitration" in their agreement, so defendant did not invoke

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Third Circuit decision that defendants loudly tout as on "the other side of the divide" from this Sixth Circuit decision. Petition, pp. 13-14. In *Elheiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007), the defendant did not invoke equitable estoppel, but instead asserted the specified contractual right to invoke an arbitration clause covering "affiliated companies," one of which the defendant claimed to be. *Elheiter* is not even close to the Sixth Circuit decision, whether in its fact pattern or in the legal principles it addresses. The most recent Fifth Circuit decision applying Sections 3 and 16(a)(1), which defendants similarly characterize as irreconcilable with this Sixth Circuit decision, also did not address whether Section 16(a)(1) permits interlocutory appeals by defendants who, as nonsignatories to arbitration agreements, unsuccessfully invoked equitable estoppel in seeking stays pending arbitration. *Waste Management, Inc. v. Residuos Industriales Multiquim, S.A.*, 372 F.3d 339 (5th Cir. 2004).

In sum, the petition has fabricated "widespread and entrenched" confusion among the circuits by inflating the question presented to make it appear that recent decisions by the Third and Fifth Circuits are incompatible with the Sixth Circuit opinion. For proof that even defendants recognize these decisions

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equitable estoppel); *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743 (2d Cir. 1991) (district court entered a discretionary stay; nonsignatory defendant did not invoke equitable estoppel); *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524 (7th Cir. 1996) (nonsignatories did not invoke equitable estoppel).

are inapposite, the Court need look no further than defendants' briefing below, in which these cases were never mentioned. That a petitioner coming before this Court would distort the question presented for review in order to create the appearance of widespread circuit confusion perhaps should come as no surprise. It doubtless is why Rule 10 emphasizes that petitions claiming a circuit split should focus on how the decision is "in conflict with the decision of another United States court of appeals *on the same important matter*." Sup. Ct. R. 10 (emphasis added).

When the inquiry in this case is limited to decisions that actually have addressed "the same important matter," it becomes apparent that this Sixth Circuit decision is only one of four. That is, including the Sixth Circuit opinion, only *four* of the dozens of opinions discussed in defendants' petition actually have addressed the specific matter at issue, namely whether Section 16(a)(1) of the FAA permits interlocutory appeals by defendants who, as nonsignatories to arbitration agreements, unsuccessfully invoked equitable estoppel principles in seeking stays pending arbitration. Although the Sixth Circuit opinion characterizes the four circuits as "split" on this issue, plaintiffs submit it is no more than a superficial disagreement that will dissipate in time on its own.

Three of the four circuit decisions addressing this point – including one written by the Chief Justice while still a Circuit Judge, a Tenth Circuit decision, and now this Sixth Circuit decision – contain simple,

straightforward textual interpretations of Section 16(a)(1) and Sections 3 and 4 of the FAA. *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 683-85 (D.C. Cir. 2003) (dismissing interlocutory appeal); *In re Universal Service Fund Telephone Billing Practice Litig.*, 428 F.3d 940, 942-45 (10th Cir. 2005) (following *DSMC* and dismissing interlocutory appeal); Appendix A. All three interpret these sections as limiting ***interlocutory*** appellate jurisdiction to those cases where the movant could invoke a written agreement compelling arbitration, which nonsignatories who unsuccessfully asserted equitable estoppel by definition could not do – precisely the reason they resorted to equitable estoppel in the first place.

In his *DSMC* opinion, then-Judge Roberts, writing for the United States Court of Appeals for the District of Columbia Circuit, discussed at length why Sections 3 and 4 – and thus also Section 16(a)(1) – cannot be applied to a nonsignatory's attempt to compel a signatory to arbitrate based on equitable estoppel:

> Section 4 does not merely require that there be a written agreement somewhere in the picture. It requires that the motion to compel be based on an alleged failure to arbitrate under that written agreement. Convera's motion to compel is not based on any alleged failure by DSMC to arbitrate under the only written agreement at issue here – the one between DSMC and NGTL. The motion is instead based on an effort to expand DSMC's obligation *beyond* the terms of that written

> agreement pursuant to principles of equitable estoppel.

Id. at 683 (emphasis original). Noting the circuit decisions addressing equitable estoppel in the arbitration context, some of which defendants' petition repeats, Judge Roberts observed:

> Those cases typically did not address jurisdiction under Section 16 of the FAA, but instead simply proceeded directly to consider the propriety of compelling signatories to arbitrate with nonsignatories. We need not and do not decide whether such an effort can ever succeed. What we do decide is that an effort to compel arbitration in such circumstances on the basis of equitable estoppel does not fall within Section 4 of the FAA. Accordingly, we hold that this court has no jurisdiction under Section 16(a)(1)(B) to hear an appeal of an order denying a motion to compel arbitration between parties *not* under a written agreement to arbitrate.
>
> In doing so we are mindful that "Section 16 is a limited grant of jurisdiction," that "[i]n general, statutes authorizing appeals should be narrowly construed," and that this is particularly true with respect to statutes allowing interlocutory appeals. . . . We are also cognizant that jurisdictional rules should be, to the extent possible, clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset. . . . Asking whether the parties are signatories to a written

> agreement to arbitrate satisfies these criteria. On the other hand, the application of equitable estoppel – if permitted in this context – requires a multifactor factual and legal inquiry to determine whether the issues to be litigated by the nonsignatory and signatory are sufficiently intertwined with the issues subject to arbitration. That type of analysis, in turn, would require this court to delve deeply into the merits of a case before even deciding whether we had interlocutory appellate jurisdiction – an unattractive prospect.

Id. at 683-84 (citations omitted; emphasis original). The opinion in *DSMC* went on to hold that Section 3 also does not apply when a nonsignatory to an arbitration clause invokes equitable estoppel in an effort to stay a signatory's suit pending arbitration. *Id.* at 684-85. Thus, a court of appeals has no jurisdiction under Section 16(a)(1)(A) over an interlocutory appeal from an order rejecting such an equitable estoppel argument.

The relevant decision of the Tenth Circuit, *In re Universal Service Fund Telephone Billing Practice Litig.*, 428 F.3d 940, 942-45 (10th Cir. 2005), reached the same conclusion on the jurisdictional issue. Quoting extensively from *DSMC*, the Tenth Circuit observed that the defendants' citations to circuit decisions – which, again, are repeated here[5] – that

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[5] All three opinions – *DSMC*, *Universal*, and the Sixth Circuit decision – correctly refuse to give any weight to opinions that dispose of interlocutory appeals on their merits without

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merely addressed equitable estoppel in this context "miss the point," adding:

> The issue in this appeal is not whether they have a right to compel arbitration, but whether they have a right to an interlocutory appeal from the denial of a motion seeking to compel arbitration. Given that statutes allowing interlocutory appeals should be narrowly construed, Defendants stand the scope of appellate jurisdiction on its head. . . .
>
> We also agree with the *DSMC* court that dismissing this appeal does not mean equitable estoppel cannot be employed to compel arbitration. Indeed, our holding is limited to whether Defendants can invoke interlocutory

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addressing the jurisdictional issue under discussion here. *See DSMC*, 349 F.3d at 683 (quoted above); *Universal*, 428 F.3d at 944 ("Defendants maintain '[c]ourts repeatedly have accepted appellate jurisdiction where the district court had denied arbitration motions by litigants that were not signatories to the relevant arbitration agreement.' They support this contention with a number of cases which simply are not apposite, however, because none of them rule upon the jurisdictional basis for their holdings. Indeed, none of them consider the issue before us."); Appendix A, p. 11a ("[I]n none of those cases does it appear that the appellees raised the issue of appellate jurisdiction to review the question on an interlocutory basis."). For reasons unknown to plaintiffs, defendants' petition devotes page after page to discussing cases that do not address this jurisdictional issue and the supposed impact of what defendants evidently consider *sub silentio* validation of interlocutory appellate jurisdiction. Just as these decisions add nothing to the weight of authority on this point, they also cannot comprise part of any alleged circuit conflict.

> appellate jurisdiction to challenge the merits of the district court's order. In the absence of jurisdiction, any thoughts we might express on whether the doctrine of equitable estoppel can or should be recognized in the circumstances of this case would be without effect.

Id. at 945 (citations omitted).

The fact that a ruling from another circuit, *Ross v. American Express Co.*, 478 F.3d 96 (2d Cir. 2007), glossed over the language of Sections 3 and 16(a)(1),[6] eschewing any real textual analysis, and refused to dismiss an appeal by nonsignatories does not warrant acceptance of the instant case, particularly given the salient features that distinguish *Ross* from the Sixth Circuit decision. The ruling in *Ross* was issued by a Second Circuit motion panel, which included a district court judge sitting by designation.

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[6] In concluding that equitable estoppel falls "under" Sections 3 and 4, *Ross* reasons that reading them otherwise would leave district courts without authority to employ equitable estoppel to stay proceedings or compel arbitration, and could result in "bifurcation of cases involving a single writing." *Id.* To the contrary, district courts can and do employ equitable estoppel in this context. *Toledano v. O'Connor*, 501 F.Supp.2d 127, 151-54 (D.D.C. 2007). Moreover, *Ross's* concern about parallel proceedings – one judicial, one arbitral – cannot justify reading into Sections 3, 4, and 16(a)(1) "equitable estoppel" references Congress did not include. It also is immaterial that a nonsignatory defendant's motion might have been labeled a "Section 3" motion. Appellate "jurisdiction is not controlled by the name that a claimant attaches to a motion or the name that a district court attaches to an order." *Workman v. Bredesen*, 486 F.3d 896, 904 (6th Cir. 2007).

The *Ross* case was later assigned to another panel for the merits, including only one of the motion panel members (as well as a different district judge sitting by designation). According to the Second Circuit's docket, *Ross* remains pending. The merits panel, therefore, is not bound to follow the motion panel's ruling and on further reflection may yet reach the same conclusion that the other three circuits did on the jurisdictional issue.

Thus, the ruling in *Ross* on which defendants must be predicating their claim of an "entrenched" circuit split may not even reflect the views of the Second Circuit panel that ultimately decides *Ross*. The inchoate nature of *Ross* belies any suggestion that there is a concrete circuit split and that the instant case should be the vehicle for resolving it. Once *Ross* is finally decided, there in fact may be unanimity among the circuits. Even if there is not, it would make more sense to use *Ross* itself as the vehicle for resolving any lingering disagreements. This is not the right case or the right time for that.

Other distinctly unusual features of this case militate against accepting it as the vehicle for deciding whether the FAA permits interlocutory appeals by defendants who, as nonsignatories to arbitration agreements, unsuccessfully invoked equitable estoppel principles in seeking stays pending arbitration. While both signatory and nonsignatory defendants are still before the district court in *Ross*, as they were in both *DSMC* and *Universal*, no signatory defendant is before the district court in this case. The only

defendant who signed an arbitration clause in this case, Bricolage, long ago filed bankruptcy. Plaintiffs' claims have been resolved and Bricolage's Plan of Liquidation has been confirmed. This is significant because it means there will be no arbitration between plaintiffs and Bricolage. So, in essence, the remaining defendants have been pursuing a stay pending an arbitration that everyone acknowledges ***will never happen*** and have been seeking to compel an arbitration of their own with plaintiffs, whose only commitment was to arbitrate with a party ***no longer before the district court***. These features make the instant case unique among the four circuit decisions cited. If the Court deems it necessary at some future time to address interlocutory appellate jurisdiction over denials of stays pending arbitration in this context, it would make logical sense to do so in a case where arbitration between signatory plaintiffs and signatory defendants is planned. Again, because of the unique circumstances, this is not such a case. For this additional reason, therefore, this is neither the right time nor the right case for addressing whether the FAA permits interlocutory appeals by defendants who, as nonsignatories to arbitration agreements, unsuccessfully invoked equitable estoppel principles in seeking stays pending arbitration.

CONCLUSION

Plaintiffs respectfully request that the petition be denied.

October 6, 2008

Respectfully submitted,

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REPLY BRIEF

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IN THE
Supreme Court of the United States

ARTHUR ANDERSEN, LLP, ET AL.,
Petitioners,
v.

WAYNE CARLISLE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY TO BRIEF IN OPPOSITION 1
CONCLUSION 10

TABLE OF AUTHORITIES

CASES

DSMC Inc. v. Convera Corp.,
349 F.3d 679 (D.C. Cir. 2003) 2, 8, 9

Ehleiter v. Grapetree Shores, Inc.,
483 F.3d 207 (3d Cir. 2007) 3, 4, 9

Hill v. GE Power Sys.,
282 F.3d 343 (5th Cir. 2002) 4

Kimberlin v. Renasant Bank,
No. 07-6040, 2008 WL 4428417
(6th Cir. Sept. 25, 2008) 9

Omni Tech Corp. v. MPC Solutions Sales, LLC,
432 F.3d 797 (7th Cir. 2005) 5

Ross v. Am. Express Co.,
478 F.3d 96 (2d Cir. 2007) 3, 6, 9

Toledano v. O'Connor,
501 F. Supp. 2d 127 (D.D.C. 2007) 8

In re Universal Serv. Fund Tel. Billing Practice Litig.,
428 F.3d 940 (10th Cir. 2005) 1, 9

Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A.,
372 F.3d 339 (5th Cir. 2004) 3, 4

STATUTES

9 U.S.C. § 3 ..... *passim*

9 U.S.C. § 4 ..... 2, 9

9 U.S.C. § 16(a)(1)(A)..... *passim*
9 U.S.C. § 16(a)(1)(B)..... 9

REPLY TO BRIEF IN OPPOSITION

1. Respondents challenge the scope of the first question presented (whether Section 16(a)(1)(A) of the Federal Arbitration Act confers appellate jurisdiction over an appeal from a denial of a Section 3 motion to stay claims involving non-signatories), the breadth of the circuit split involving that question, and whether this case is a proper vehicle for reaching the first question presented. Each of these arguments fails.

a. Respondents argue that the first question presented should be limited to whether Section 16(a)(1)(A) of the FAA permits appeals from denials of Section 3 motions made by non-signatories on the basis of *equitable estoppel*. Br. Opp. 10. Respondents note, correctly, that petitioners sought below to enforce the arbitration agreement on the basis of equitable estoppel. *Id.*

The particular legal theory under which Section 3 is invoked, however, is irrelevant to the Sixth Circuit decision below, which—like the Tenth and D.C. Circuit decisions it followed—rests solely on the bright-line principle that Section 3 does not apply to claims involving non-signatories. *See* Pet. App. 2a-3a ("In the absence of an applicable written agreement to arbitrate, the plaintiffs contend that Section 3 is inapplicable in this action and consequently, that we are without jurisdiction to hear this appeal on an interlocutory basis. We agree."); *In re Universal Serv. Fund Tel. Billing Practice Litig.*, 428 F.3d 940, 942 (10th Cir. 2005) ("Therefore, whether Defendants are appealing from the district court's

denial of a stay [under Section 3] or its refusal to compel arbitration [under Section 4], the plain language of the jurisdictional statute mandates Defendants' prior reliance upon a *written agreement* to arbitrate as a condition precedent to our jurisdiction." (emphasis by the court)); *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 685 (D.C. Cir. 2003) ("Section 3 does not apply to litigation involving parties not subject to a written agreement.").

The holdings of these decisions clearly are not limited to Section 3 motions made on the basis of equitable estoppel. Indeed, the bright-line principle enunciated in *DSMC* and later followed by the Tenth Circuit and the Sixth Circuit below could not turn on equitable estoppel because in *DSMC*, Section 3 was *not* invoked on the basis of equitable estoppel. Instead, a signatory defendant sought to stay the plaintiff's claim against a non-signatory co-defendant because of the effect of the litigation on an ongoing arbitration between the plaintiff and movant. *See* 349 F.3d at 684. Because the claim that was the subject of the Section 3 motion involved a non-signatory, the D.C. Circuit held that Section 3 did not apply as a matter of law, thus precluding appellate jurisdiction under Section 16(a)(1)(A). *Id.*[1]

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[1] *DSMC* also involved a non-signatory's Section 4 motion to compel arbitration on the basis of equitable estoppel. *See* 349 F.3d at 682-84. The D.C. Circuit held that it lacked appellate jurisdiction over denial of the Section 4 motion for the same reason that it lacked jurisdiction over denial of the Section 3 motion: the motion sought

Accordingly, the bright-line rule followed by the Sixth, Tenth, and D.C. Circuits is not limited to equitable estoppel cases, as the particular legal theory upon which Section 3 is invoked to stay a claim involving a non-signatory is irrelevant under that rule. The first question presented properly corresponds to the broad holding below by asking whether Section 16(a)(1)(A) of the Federal Arbitration Act confers appellate jurisdiction over an appeal from a denial of a Section 3 motion to stay claims involving non-signatories.

b. Respondents argue that the circuit split involving the first question presented is limited to the Second Circuit's decision in *Ross v. American Express Co.*, 478 F.3d 96 (2d Cir. 2007), which respondents admit conflicts with the rule of the Sixth, Tenth, and D.C. Circuits. According to respondents, the resulting split does not encompass the First, Third, Fourth, Fifth, Eighth, or Eleventh Circuits.

Respondents first argue that *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007) and *Waste Management, Inc. v. Residuos Industriales Multiquim, S.A.*, 372 F.3d 339 (5th Cir. 2004), both of which expressly upheld jurisdiction over appeals from denials of Section 3 motions involving non-signatories, are not part of the split because they did not involve equitable estoppel. Br. Opp. 13-15. But as demonstrated above, the bright-line rule followed by the Sixth, Tenth, and D.C. Circuits

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relief with respect to claims involving a non-signatory. *Id.*

operates without regard to the legal theories upon which Section 3 is invoked in cases involving non-signatories. Had the Third and Fifth Circuits followed that bright-line rule in *Ehleiter* and *Waste Management*, they would have dismissed, rather than expressly found jurisdiction over, appeals from denials of Section 3 motions to stay claims involving non-signatories. *Ehleiter* and *Waste Management* therefore necessarily conflict with the bright-line rule followed by the Sixth, Tenth, and D.C. Circuits.

In any event, respondents do not dispute that the Fifth Circuit's earlier decision in *Hill v. GE Power Systems*, 282 F.3d 343 (5th Cir. 2002) (cited in Pet. 14-15), in which the Fifth Circuit expressly found appellate jurisdiction over an appeal from a denial of a non-signatory's motion to stay under Section 3, *see* 282 F.3d at 348, and which *did* involve equitable estoppel, *id.*, conflicts with the bright-line rule of the Sixth, Tenth, and D.C. Circuits.

Respondents also argue that the decisions of the First, Fourth, Eighth, and Eleventh Circuits (*see* Pet. 17) are not part of the circuit split involving the first question presented because they did not expressly address appellate jurisdiction, even though they exercised it in appeals from denials of Section 3 motions to stay claims involving non-signatories. *See* Br. Opp. 16-17 n.5.

The decisions of the First, Fourth, Eighth, and Eleventh Circuits exercising (but not expressly addressing) appellate jurisdiction under Section 16(a)(1)(A) would indeed be irrelevant to the circuit split concerning the first question presented *if* the

Sixth, Tenth, and D.C. Circuits had (correctly) maintained the analytical distinction between appellate jurisdiction under Section 16(a)(1)(A) and the merits of Section 3. *See* Pet. 27-30 (explaining distinction); *see also Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797, 800 (7th Cir. 2005) ("Appellate jurisdiction under § 16(a)(1)(A) depends on the existence (and denial) of a motion for stay pending arbitration, *not on the movant being correct.* If a § 3 motion is made and denied, then appellate jurisdiction exists to determine whether the denial was proper." (emphasis added)) (Easterbrook, J.).

Respondents concede, however, that the Sixth Circuit in this case, like the Tenth and D.C. Circuits before it, collapsed appellate jurisdiction and the merits together by holding that appellate jurisdiction does not exist under Section 16(a)(1)(A) *because Section 3 does not apply as a matter of law to claims involving non-signatories*. *See* Br. Opp. 13-14; *see also* Pet. 8-9 (explaining how the Sixth Circuit collapsed appellate jurisdiction into the merits). Precisely because the Sixth, Tenth, and D.C. Circuits (erroneously) view appellate jurisdiction through the prism of a *merits-based* construction of Section 3, the circuit split over appellate jurisdiction necessarily encompasses the First, Fourth, Eighth, and Eleventh Circuits, which construe Section 3 to apply to claims involving non-signatories when non-signatories can otherwise enforce—as petitioners sought to do in this case—the relevant arbitration agreement under principles of contract and agency law, including equitable estoppel. *See* Pet. 18, 22-23.

c. Respondents also characterize the Second Circuit's decision in *Ross*, which they admit conflicts with the Sixth Circuit's decision below, as "inchoate." Br. Opp. 19. *Ross* involved a precedential decision by a motions panel in a case still pending before a merits panel as of this writing. Nevertheless, it remains the law of the Second Circuit unless and until it is overturned. Thus, it is as "inchoate" as any other published, precedential decision. In any event, even if *Ross* is not taken into account, the bright-line rule followed by the Sixth, Tenth, and D.C. Circuits rejecting appellate jurisdiction over denials of Section 3 motions involving non-signatories conflicts with decisions of the First, Third, Fourth, Fifth, Eighth, and Eleventh Circuits.

d. Finally, respondents challenge whether this case is a proper vehicle for reaching the first question presented. Respondents argue that because Bricolage (the signatory co-defendant) is in bankruptcy, petitioners "have been pursuing a stay pending an arbitration that everyone acknowledges will never happen and have been seeking to compel an arbitration of their own with plaintiffs, whose only commitment was to arbitrate with a party no longer before the district court." Br. Opp. 20.

As respondents admit, however, petitioners moved in the district court for a Section 3 stay on the basis that "equitable estoppel prevented plaintiffs from avoiding arbitration of all claims *against the nonsignatory defendants* [i.e., petitioners]." Br. Opp. 2 (emphasis added). Alternatively, petitioners also moved for a Section 3 stay on the basis that even if equitable estoppel did not require arbitration of

respondents' claims against them, "the court should stay the claims against [petitioners], pending the arbitration they anticipated between plaintiffs and Bricolage, the lone statutory defendant." *Id.*

Bricolage's bankruptcy filing plainly mooted the alternative ground for petitioners'—motion—that respondents' claims against petitioners should be stayed pending arbitration of respondents' claims against *Bricolage*—because no arbitration involving Bricolage would ever take place. For that reason, petitioners did not raise that issue in the Sixth Circuit, and do not raise it in their petition.

Petitioners did appeal, however, the district court's denial of the primary grounds of their Section 3 motion: that equitable estoppel required arbitration of respondents' claims against *petitioners*, and those claims should be stayed pending such an arbitration between respondents and *petitioners*. The district court denied that motion on the merits, holding that equitable estoppel does not require arbitration of respondents' claims against petitioners. Pet. App. 15a. On appeal to the Sixth Circuit, petitioners argued that equitable estoppel required arbitration of respondents' claims against them, and therefore the district court erred in denying a Section 3 stay pending such an arbitration. The Sixth Circuit never reached the merits of that equitable estoppel argument, however, because it determined that Section 3 does not apply as a matter of law to respondents' claims against petitioners (as non-signatories). Pet. App. 2a-3a, 12a.

Thus, contrary to respondents' assertion, petitioners are *not* "pursuing a stay pending an arbitration that everyone acknowledges will never happen." Br. Opp. 20. Rather, petitioners seek a stay pending arbitration of respondents' claims against them under equitable estoppel principles. Although Bricolage's bankruptcy may be relevant to whether petitioners can succeed *on the merits* in enforcing the arbitration agreement, that fact is immaterial to the holding of the Sixth Circuit and the questions presented by this petition: whether, as a non-signatory, petitioners' motion was properly brought under Section 3 of the FAA, and whether appellate jurisdiction exists under Section 16(a)(1)(A) to review its denial.

2. Respondents do not even acknowledge the second question presented (whether Section 3 allows a district court to stay claims against non-signatories when the non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel), and thus do not dispute that a circuit split exists regarding this question, with the Sixth, Tenth, and D.C. Circuits conflicting with the First, Fourth, Eighth, Ninth, and Eleventh Circuits. *See* Pet. 21-24. Indeed, a recent district court decision cited by respondents, *see* Br. Opp. 18 n.6, recognizes that split. *See Toledano v. O'Connor*, 501 F. Supp. 2d 127, 153 (D.D.C. 2007) (noting conflict between D.C. Circuit in *DSMC* and Second, Eighth, and Eleventh Circuits on whether Section 3 applies to claims involving non-signatories and following *DSMC*). Respondents have offered no argument suggesting

why the second question is unworthy of this Court's review or why this case is an inappropriate vehicle for reaching that question.

3. Furthermore, respondents highlight an additional point that *supports* granting review. In restructuring the first question presented to encompass appellate jurisdiction conferred by Section 16(a)(1)(B) over denials of *Section 4* motions to compel arbitration, *see* Br. Opp. i, respondents tacitly acknowledge that, even though this case only involves a Section 3 motion to stay, as a practical matter review in this case will also resolve identical questions concerning the rights of non-signatories to compel arbitration under Section 4 of the FAA and its parallel provision for interlocutory appellate review, Section 16(a)(1)(B). *See* Pet. 3 nn.1, 3 (noting that courts interpret Sections 3 and 4 in tandem); *see also DSMC*, 349 F.3d at 682-85 (applying same jurisdictional and merits analysis to Section 3 motion to stay and Section 4 motion to compel); *Universal Serv. Fund*, 428 F.3d at 942 (same); *Ross*, 478 F.3d at 98-100 & n.2 (disagreeing with *DSMC* and *Universal Service Fund* but interpreting Section 3 and Section 4 in tandem); *Ehleiter*, 482 F.3d at 213 (noting the identical analysis for appellate jurisdiction under Section 16(a)(1)(A) for denials of Section 3 motions and under Section 16(a)(1)(B) for denials of Section 4 motions); *Kimberlin v. Renasant Bank*, No. 07-6040, 2008 WL 4428417, at *2-3 (6th Cir. Sept. 25, 2008) (applying analysis of Sixth Circuit below to Section 4 and dismissing appeal of non-signatory for lack of appellate jurisdiction). Thus, as respondents tacitly acknowledge, a merits

decision by this Court in this case will effectively stabilize the law under Section 4 of the FAA as well as Section 3.

CONCLUSION

For the reasons provided above and in the petition for writ of certiorari, this Court should grant the petition.

Respectfully submitted,

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Dated: October 21, 2008

JOINT APPENDIX

114

No. 08-146

(5)

Supreme Court U.S.
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12-19-08

In The Supreme Court of the United States

ARTHUR ANDERSEN, LLP, et al.,

Petitioners,

v.

WAYNE CARLISLE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

Page

Relevant Docket Entries in the United States District Court for the Eastern District of Kentucky (Covington Division), Case No. 05-cv-00059-DLB 1

Relevant Docket Entries in the United States Court of Appeals for the Sixth Circuit, Case No. 06-5290 7

Plaintiffs' Complaint (Case No. 05-cv-00059-DLB) (March 25, 2005) (Dist. Ct. Dkt. No. 1) 11

Motion by Arthur Andersen LLP to Stay Litigation Pending Arbitration (Case No. 05-cv-00059-DLB) (June 10, 2005) (Dist. Ct. Dkt. No. 31) 52

Motion by Curtis, Mallet-Prevost, Colt & Mosle, LLP and William J. Bricker, Jr. to Stay Litigation Pending Arbitration or in the Alternative to Dismiss (Case No. 05-cv-00059-DLB) (June 10, 2005) (Dist. Ct. Dkt. No. 35) 54

Declaration of Gary L. Strassel (July 25, 2005) (Dist. Ct. Dkt. 55) (Exhibits to Declaration Excluded) 57

Motion by Prism Connectivity Ventures, LLC for Joinder in Motions to Stay Litigation Pending Arbitration by Bricolage Capital, LLC, Arthur Andersen LLP, and Curtis, Mallet-Prevost, Colt & Mosle, LLP (Case No. 05-cv-00059-DLB) (Aug. 26, 2005) (Dist. Ct. Dkt. No. 65) 63

TABLE OF CONTENTS – Continued

Page

Motion by Integrated Capital Associates, Inc. and Intercontinental Pacific Group for Joinder in Motions to Stay Litigation Pending Arbitration by Bricolage Capital, LLC, Arthur Andersen LLP, and Curtis, Mallet-Prevost, Colt & Mosle, LLP (Case No. 05-cv-00059-DLB) (Aug. 26, 2005) (Dist. Ct. Dkt. No. 66) 65

Investment Management Agreement signed by James E. Bushman on behalf of JB Cinoh, LLC (Case No. 05-cv-00059-DLB) (Ex. D to Dist. Ct. Dkt. No. 31) 67

Investment Management Agreement signed by Wayne Carlisle on behalf of WC Thomas, LLC (Case No. 05-cv-00059-DLB) (Ex. E to Dist. Ct. Dkt. No. 31) 86

Investment Management Agreement signed by Gary L. Strassel on behalf of GS Noky, LLC (Case No. 05-cv-00059-DLB) (Ex. F to Dist. Ct. Dkt. No. 31) 105

TABLE OF CONTENTS – Continued

Page

The following materials will be omitted in printing the joint appendix because they appear in the appendix to the printed *Petition for Writ of Certiorari.*

Opinion of the United States Court of Appeals for the Sixth Circuit (filed April 9, 2008) (Appendix A)..... 1a-12a

Excerpted Transcript of Preliminary Pretrial Conference Before David L. Bunning, United States District Court Judge (Feb. 3, 2006) (Appendix B)..... 13a-16a

Order of the United States District Court, Eastern District of Kentucky at Covington (filed Feb. 6, 2006) (Appendix C)..... 17-22a

RELEVANT DOCKET ENTRIES

United States District Court for the Eastern District of Kentucky (Covington Division)
Case No. 05-cv-00059-DLB

Date	Dkt. No.	Entry
03/25/2005	1	COMPLAINT (Filing fee $250; receipt number 117445), filed by WC Thomas, LLC, WC Venture Corp., Ohio 1999 Irrevocable ESBT of Wayne Carlisle, James E. Bushman, JB Cinoh, LLC, Wayne Carlisle, JEB Venture Corp., JEB Revocable ESBT, Wayne Carlisle, Gary L. Strassel, GS NOKY, LLC, WJG Strategic Investments, LLC.
		Attachments: # 1 Civil Cover Sheet, Case Assignment, Receipt)(JMM) (Entered: 03/28/2005)
06/10/2005	27	MOTION to Stay by Bricolage Capital, LLC *Motion to Stay Litigation Pending Arbitration* (Murphy, Kevin) (Entered: 06/10/2005)
06/10/2005	31	MOTION to Stay Proceedings Pending Arbitration by Arthur Anderson [sic] LLP (Attachments: # 1 Affidavit of Jocelyn D. Francoeur# 2 Exhibit A –

		Letter to James E. Bushman# 3 Exhibit B – Letter to Mr. Wayne Carlisle# 4 Exhibit C – Letter to Mr. Gary L. Strassel# 5 Exhibit D – Investment Management Agreement as to JB Cinoh, LLC# 6 Exhibit E – Investment Management Agreement# 7 Exhibit F – Investment Management Agreement as to GS No. Ky. LLC# 8 Proposed Order)(LSG) (Entered: 06/13/2005)
06/10/2005	35	MOTION to Stay or in the Alternative MOTION to Dismiss by Custis [sic], Mallet-Prevost, Colt & Mosle, LLP, William L. Bricker, Jr. (Attachments: # 1 Proposed Order)(LSG) (Entered: 06/13/2005)
07/26/2005	54	RESPONSE in Opposition re 27 MOTION to Stay by Bricolage Capital, LLC, 31 MOTION to Stay by Arthur Anderson [sic] LLP, 35 MOTION to Dismiss by Custis [sic], Mallet-Prevost, Colt & Mosle, LLP, William L. Bricker, Jr MOTION to Stay by Custis [sic], Mallet-Prevost, Colt & Mosle, LLP, William L. Bricker Jr filed by WC Thomas, LLC, WC

		Venture Corp., Ohio 1999 Irrevocable ESBT of Wayne Carlisle, James E. Bushman, JB Cinoh, LLC, Wayne Carlisle, JEB Venture Corp., JEB Revocable ESBT, Wayne Carlisle, Gary L. Strassel, GS NOKY, LLC, WJG Strategic Investments, LLC. (Attachments: # 1 Unreported Decisions (1 or 3)# 2 Unreported Decisions (2 of 3)# 3 Unreported Decisions (3 of 3))(Geoppinger, Jean) (Entered: 07/26/2005)
07/26/2005	55	AFFIDAVIT in Opposition re 27 MOTION to Stay by Bricolage Capital, LLC, 37 MOTION to Dismiss by Integrated Capital Associates, Inc., Intercontinental Pacific Group, Inc., 39 MOTION to Dismiss by Prism Connectivity Ventures, LLC, 29 MOTION to Dismiss for Lack of Jurisdiction by Andrew D. Beer, 31 MOTION to Stay by Arthur Anderson [sic] LLP, 35 MOTION to Dismiss by Custis [sic], Mallet-Prevost, Colt & Mosle, LLP, William L. Bricker, Jr MOTION to Stay by Custis [sic], Mallet-Prevost, Colt & Mosle, LLP, William L. Bricker, Jr, 50 MOTION to

		Dismiss for Lack of Jurisdiction by Bricolage Capital, LLC filed by WC Thomas, LLC, WC Venture Corp., Ohio 1999 Irrevocable ESBT of Wayne Carlisle, James E. Bushman, JB Cinoh, LLC, Wayne Carlisle, JEB Venture Corp., JEB Revocable ESBT, Wayne Carlisle, Gary L. Strassel, GS NOKY, LLC, WJG Strategic Investments, LLC. (Attachments: # 1 Exhibit 1 (Part 1 of 2)# 2 Exhibit 1 (Part 2 of 2)# 3 Exhibit 2# 4 Exhibit 3# 5 Exhibit 4# 6 Exhibit 5# 7 Exhibit 6# 8 Exhibit 7# Exhibit 8# 10 Exhibit 9# 11 Exhibit 10# 12 Exhibit 11)(Geoppinger, Jean) Additional attachment(s) added on 7/27/2005 (Greiwe, Linda). (Entered: 07/26/2005)
08/26/2005	65	MOTION for Joinder re 27 Motion to Stay Litigation Pending Arbitration filed by Prism Connectivity Ventures, LLC (Attachments: # 1 Proposed Order)(LSG) (Entered: 08/26/2005)
08/26/2005	66	MOTION for Joinder re 27 Motion to Stay Litigation Pending Arbitration filed by Integrated Capital Associates,

		Inc., and Intercontinental Pacific Group (Attachments: # 1 Proposed Order)(LSG) (Entered: 08/26/2005)
10/25/2005	73	SUGGESTION OF BANKRUPTCY Upon the Record *of Bricolage Capital, LLC* by Bricolage Capital, LLC. (Attachments: # 1 Exhibit A – Notice of Bankruptcy Case Filing)(Nalley, David) (Entered: 10/25/2005)
02/06/2006	89	MINUTE ENTRY FOR INITIAL PRETRIAL CONFERENCE held on 2/3/2006 before Judge David L. Bunning, DENYING AS MOOT 85 Motion to Dismiss for Lack of Jurisdiction and 27 Motion to Stay Litigation Pending Arbitration and 58 Plaintiff's Motion for Order Setting Oral Argument; and DENYING 31 and 35 and 65 and 66 Motions to Stay Proceedings Pending Arbitration and DENYING WITHOUT PREJUDICE 29 and 39 and 37 Motions to Dismiss for lack of personal jurisdiction; Answers to Complaints to be filed by 3/8/2006; Report of planning meeting and parties Civil Rule 26(f) conference are WAIVED;

		Discovery due by 8/3/2006; Amended Complaint is due by 9/5/2006 and answers to Amended complaint are due 30 days thereafter; separate order referring pretrial and discovery proceedings to Magistrate Judge J. Gregory Wehrman to be entered concurrently. (COURT REPORTER: LISA WIESMAN) (lsg)cc: COR (Entered: 02/06/2006)
02/14/2006	91	TRANSCRIPT of Official Proceedings consisting of 108 pages: Preliminary Pretrial Conference held on 2/3/2006 before Judge David L. Bunning. Court Reporter: Lisa Wiesman. (LSG) (Entered: 02/14/2006)
02/17/2006	92	JOINT NOTICE OF APPEAL by Curtis, Mallet-Prevost, Colt & Mosle, LLP, William L. Bricker, J., Arthur Anderson [sic] LLP, Integrated Capital Associates, Inc., Intercontinental Pacific Group, Inc., Prism Connectivity Ventures, LLC. Filing fee $255, receipt number 122654. TRANSMITTED to 6CCA via Email cc: COR, 6CCA (Attachments: # 1 Receipt)(LSG) Modified to take out appeal end date on

4/16/2008 (LSG). (Entered: 02/21/2006)

United States Court of Appeals for the Sixth Circuit
Case No. 06-5290

Date	Dkt. No.	Entry
03/02/2006		Civil Case Docketed. Notice filed by Appellants Curtis, Mallet, William L. Bricker, Arthur Anderson [sic], Integrated Cap, Intercontinental Pac, Prism Connectivity. Transcript needed:
06/01/2006		PROOF BRIEF filed by Douglas E. Whitney for Appellant Arthur Anderson [sic], Russell S. Sayre for Appellants William L. Bricker and Curtis, Mallet, Richard J. Idell for Appellants Prism Connectivity, Intercontinental Pac, and Integrated Cap. Certificate of service date 6/1/06. [06-5290]
09/29/2006		PROOF BRIEF filed by James R. Cummins, Jean M. Geoppinger and Stanley M. Chesley for Appellees GS NOKY, Gary L. Strassel, JEB Revocable ESBT, JEB Venture Corp, JB Cinoh, James E. Bushman, OH 1999 ESBT, WC Venture Corp, WC Thomas, WJG Strategic

	Inv, Wayne Carlisle Certificate of service date 9/29/06. [06-5290
10/31/2006	PROOF REPLY BRIEF filed by Richard J. Idell, Donald L. Stepner, Earle Jay Maiman, Douglas E. Whitney, Russell S. Sayre and Robert B. Craig for Appellants. Certificate of service date 10/30/06. Final reply brief due 11/27/06. [06-5290]
11/22/2006	FINAL BRIEF filed by Douglas E. Whitney, Russell S. Sayre and Richard J. Idell for Appellants. Copies: 7. Certificate of service date 11/22/06. [06-5290]
11/22/2006	FINAL REPLY BRIEF filed by Douglas E. Whitney, Russell S. Sayre and Richard J. Idell for Appellants. Copies: 7 Certificate of service date 11/22/06. [06-5290]
11/27/2006	FINAL BRIEF filed by Stanley M. Chesley, Jean M. Geoppinger and James R. Cummins for Appellees GS NOKY, Gary L. Strassel, JEB Revocable ESBT, JEB Venture Corp, JB Cinoh, James E. Bushman, OH 1999 ESBT, WC Venture Corp, WC Thomas, WJG Strategic Inv, Wayne Carlisle,

	Copies: 7. Certificate of service date 11/27/06. [06-5290]
11/01/2007	CAUSE ARGUED on. by Mr. Douglas E. Whitney for Appellant Arthur Anderson [sic], LLP and Mr. Paul M. De Marco for Appellees Gary L. Strassel, WC Thomas, LLC, Wayne Carlisle, JB Venture Corp., Ohio 1999 Irrevocable ESBT of Wayne Carlisle, JB Cinoh, LLC, GS NOKY, LLC, WJG Strategic Investments, LLC, JEB Revocable ESBT, James E. Bushman and WC Venture Corp. before Judges Daughtrey; Cook; Vinson
04/09/2008	OPINION filed: Appeal is DISMISSED; case is REMANDED; decision for publication pursuant to local rule 206. Martha Craig Daughtrey (AUTHORING), Deborah L. Cook, Circuit Judges; C. Roger Vinson, U.S. District Judge for the ND of FL.
04/09/2008	JUDGMENT: Appeal is DISMISSED; case is REMANDED.
05/07/2008	ORDER filed granting motion to stay mandate [3764529-2] filed by Mr. Russell S. Sayre , Mr. Douglas E. Whitney , Mr. Robert B. Craig, Mr.

	Donald L. Stepner, Mr. Earle Jay Maiman and Mr. Richard J. Idell for Appellants. Martha Craig Daughtrey, Circuit Judge; Deborah L. Cook, Circuit Judge and C. Roger Vinson, U.S. District Judge for the Northern District of Florida
07/03/2008	ORDER filed granting motion to stay mandate [3798938-2] filed by Mr. Russell S. Sayre, Mr. Robert B. Craig, Mr. Donald L. Stephner, Mr. Earle Jay Maiman, Mr. Richard J. Idell and Mr. Jack Frederick Fuchs for Arthur Anderson [sic], LLP. Martha Craig Daughtrey, Circuit Judge; Deborah L. Cook, Circuit Judge and C. Roger Vinson, U.S. District Judge.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTICT OF KENTUCKY

WAYNE CARLISLE **66 Rio Vista Drive** **Ft. Thomas, Kentucky 41075**	**Case No.** 05-59-DLB **(Judge _____)** **(Magistrate _____)**
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JB CINOH, LLC **Post Office Box 72160** **Newport, Kentucky 41072**	
JEB VENTURE CORP. **Post Office Box 72160** **Newport, Kentucky 41072**	
JEB REVOCABLE ESBT, WAYNE CARLISLE, TRUSTEE **3040 Forrer Street** **Cincinnati, Ohio 45209**	

GARY L. STRASSEL
Post Office Box 72160
Newport, Kentucky 41072

and

GS NOKY, LLC
Post Office Box 72160
Newport, Kentucky 41072

Plaintiffs,

v.

CURTIS, MALLET-PREVOST, COLT & MOSLE, LLP
101 Park Avenue, 35th Floor
New York, New York 10178

WILLIAM L. BRICKER, JR.
c/o Curtis, Mallet-Prevost, Colt & Mosle, LLP
101 Park Avenue, 35th Floor
New York, New York 10178

BRICOLAGE CAPITAL, LLC
10 East 50th Street, 22nd Floor
New York, New York 10022

ANDREW D. BEER
c/o Bricolage Capital, LLC
10 East 50th Street, 22nd Floor
New York, New York 10022

SAMYAK C. VEERA
c/o Bricolage Capital, LLC
10 East 50th Street,
22nd Floor
New York, New York 10022

ARTHUR ANDERSEN LLP
33 West Monroe Street
Chicago, Illinois 60603

INTEGRATED CAPITAL ASSOCIATES, INC.
220 Jackson Street,
Suite 2200
San Francisco, California 94111

INTERCONTINENTAL PACIFIC GROUP, INC.
220 Jackson Street,
Suite 2200
San Francisco, California 94111

and

PRISM CONNECTIVITY VENTURES, LLC
c/o Nationwide Information Services, Inc.,
Registered Agent
15 E. North Street
Dover, Delaware 19901

Defendants.

COMPLAINT

Now come plaintiffs, Wayne Carlisle, WJG Strategic Investments, LLC, WC Thomas, LLC, WC Venture Corp., the Ohio 1999 Irrevocable Trust of Wayne Carlisle, James E. Bushman, JB Cinoh, LLC, JEB Venture Corp., the JEB Revocable ESBT, Wayne Carlisle, Trustee, Gary L. Strassel and GS Noky, LLC [collectively "Plaintiffs"], and for their complaint against defendants, Curtis, Mallet-Prevost, Colt & Mosle, LLP, William L. Bricker, Jr., Bricolage Capital, LLC, Andrew D. Beer, Samyak C. Veera, Arthur Andersen, LLC, Integrated Capital Associates, Inc., Intercontinental Pacific Group, Inc. and Prism Connectivity Ventures, LLC [collectively "Defendants"], state as follows.

I.

INTRODUCTION

1. The Plaintiffs were induced by a group of conflicted professionals with hidden business relationships and interests to buy a consolidated investment package designed to provide tax and other financial benefits. The tax savings elements, including legal advice, written opinions, tax planning advice and securities trading activities, were designed and promoted by the Defendants who knew, or should have known, that the strategy was a series of sham transactions that had no hope of passing review by the Internal Revenue Service.

2. Some of these Defendants issued legal advice and written opinions that were reckless and not independently arrived at. As the Plaintiffs would discover, the advice and opinions could not form the basis for any tax position taken by them, or produce the tax benefits they thought they would be able to claim.

3. In addition, as an integral part and condition of the investment package, Plaintiffs were required, due to the conspiracy of the Defendants, to purchase high risk stock-related warrants and options that were virtually worthless. As Plaintiffs would discover, those required purchases were nothing more than a conduit for the payment of fees and expenses to the promoters of, and other participants in, the transactions.

II.

JURISDICTION AND VENUE

4. This is an action for fraud, civil conspiracy, professional malpractice, breach of fiduciary duty, breach of contract, breach of duty of good faith and fair dealing and negligence.

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332. Plaintiffs allege damages in excess of the jurisdictional amount, exclusive of interest and costs.

6. Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1391(a). One or more of the Defendants

reside, may be found, has an agent or transacts its affairs in this district.

III.

PARTIES

7. Plaintiff Wayne Carlisle is, and at all times relevant hereto was, a citizen and resident of the Commonwealth of Kentucky, who conducted business in the Commonwealth.

8. Plaintiff WJG Strategic Investments, LLC ["WJG Strategic Investments"] is a limited liability company organized and existing under the laws of the State of Kentucky, with its principal place of business in Newport, Kentucky. At all times relevant hereto, WJG Strategic Investments was the Plaintiffs' investment company.

9. Plaintiff WC Thomas, LLC was a single-member limited liability company organized and existing under the laws of the State of Ohio, with its principal place of business in Cincinnati, Ohio. At all times relevant hereto, Carlisle utilized WC Thomas, LLC to engage in Leveraged Option Strategy (as defined *infra*) transactions.

10. Plaintiff WC Venture Corp. was a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Cincinnati, Ohio. At all times relevant hereto, Carlisle utilized WC Venture Corp. to engage in Leveraged Option Strategy transactions.

11. Plaintiff the Ohio 1999 Irrevocable ESBT of Wayne Carlisle [the "Ohio 1999 Irrevocable ESBT"] is a trust created and existing under the laws of the State of Ohio, with its principal place of business in Cincinnati, Ohio. At all times relevant hereto, Carlisle utilized the Ohio 1999 Irrevocable Trust to engage in Leveraged Option Strategy transactions.

12. Plaintiff James E. Bushman is, and at all times relevant hereto was, a citizen and resident of State of Ohio, who conducted business in the Commonwealth.

13. Plaintiff JB Cinoh, LLC was a single-member limited liability company organized and existing under the laws of the State of Ohio, with its principal place of business in Cincinnati, Ohio. At all times relevant hereto, Bushman utilized JB Cinoh, LLC to engage in Leveraged Option Strategy transactions.

14. Plaintiff JEB Venture Corp. was a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Cincinnati, Ohio. At all times relevant hereto, Bushman utilized JEB Venture Corp. to engage in Leveraged Option Strategy transactions.

15. Plaintiff the JEB Revocable ESBT, Wayne Carlisle, Trustee [the "JEB Revocable Trust"] is a trust created and existing under the laws of the State of Ohio, with its principal place of business in Cincinnati, Ohio. At all times relevant hereto, Bushman utilized the JEB Revocable ESBT, Wayne Carlisle,

Trustee to engage in Leveraged Option Strategy transactions.

16. Plaintiff Gary L. Strassel is, and at all times relevant hereto was, a citizen and resident of the State of Ohio, who conducted business in the Commonwealth.

17. Plaintiff GS Noky, LLC was a single-member limited liability company organized and existing under the laws of the State of Ohio, with its principal place of business in Cincinnati, Ohio. At all times relevant hereto, Strassel utilized GS Noky, LLC to engage in Leveraged Option Strategy transactions.

18. Defendant Curtis, Mallet-Prevost, Colt & Mosle, LLP [the "Curtis Firm"] is a law firm, organized and existing as a limited liability partnership under the laws of the State of New York, with its principal place of business in New York, New York. At all times relevant hereto, the Curtis Firm transacted business in the Eastern District of Kentucky.

19. Defendant William L. Bricker, Jr. ["Bricker"] is, and at all times relevant hereto was, a citizen and resident of the State of Connecticut, an attorney and partner of the law firm Curtis, Mallet-Prevost, Colt & Mosle, LLP.

20. Defendant Bricolage Capital, LLC ["Bricolage"] is a limited liability corporation organized and existing under the laws of the State of New York, with its principal place of business in New York, New York.

At all times relevant hereto, Bricolage transacted business in the Eastern District of Kentucky.

21. Defendant, Andrew D. Beer ["Beer"] is, and at all times relevant hereto was, a citizen and resident of the State of Connecticut, and a principal of Bricolage Capital, LLC.

22. Defendant, Samyak C. Veera ["Veera"] is, and at all times relevant hereto was, a citizen and resident of the State of New York, and a principal of Bricolage Capital, LLC.

23. Defendant Arthur Andersen, LLC ["Andersen"] is an accounting firm, organized and existing as a limited liability corporation under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois. At all times relevant hereto, Arthur Andersen transacted business in the Eastern District of Kentucky.

24. Defendant Intercontinental Pacific Group, Inc. ["IPG"] is a corporation organized and existing under the laws of the State of California, with its principal place of business in San Francisco, California. IPG is an investment banking firm, with the same principals as ICA.

25. Defendant Integrated Capital Associates, Inc. ["ICA"] is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in San Francisco, California. ICA is an investment banking firm, with the same principals as IPG.

26. Defendant Prism Connectivity Ventures, LLC ["Prism Connectivity"] is a limited liability corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Dover, Delaware.

IV.

BACKGROUND FACTS

27. Andersen, based in Chicago, Illinois, was once one of the so-called "Big Five" accounting firms in the United States. Among other things, Andersen performed accounting and consulting services for clients that operated businesses throughout the United States and the world. Andersen lost is auditing license in the United States in 2002 after it was convicted of obstructing justice for shredding documents related to the Enron Corporation. At all times relevant hereto, Andersen performed business and personal accounting services for, and provided tax advice to, Plaintiffs.

28. In June, 1999, Plaintiffs sold their heavy construction equipment business. Prior to the sale of the business, Andersen also served as the company's accountant, auditor and tax advisor for more than twenty years.

29. After the sale of their business, Plaintiffs began exploring methods of legally minimizing taxes on gains realized from the sale. Plaintiffs consulted with their tax advisor and accountant Andersen, who

advised them on potential tax shelters, investment options and others matters.

Defendants' Leveraged Option Strategy and Conditions of Participation Therein

30. In approximately September, 1999, Andersen introduced Plaintiffs to Bricolage, which held itself out as "a financial boutique that developed complex structured transactions for high net worth individuals and private corporations." Andersen, Bricolage and the Curtis Firm designed and jointly recommended a tax shelter, a leveraged option strategy involving foreign currency exchange options [the "Leveraged Option Strategy"], to Plaintiffs.

31. The Leveraged Option Strategy used a series of steps, involving interests in partnerships, to generate tax losses to offset income from other transactions. In one Leveraged Option Strategy variation:

> a taxpayer purchases and writes options and purports to create a substantial positive basis in a partnership interest by transferring those option positions to a partnership. For example, a taxpayer might purchase call options for a cost of $1,000X and simultaneously write offsetting call options, with a slightly higher strike price but the same expiration date, for a premium of slightly less than $1,000X. Those option positions are then transferred to a partnership which, using additional amounts contributed to the

> partnership, may engage in investment activities.
>
> Under the position advanced by the promoters of this arrangement, the taxpayer claims that the basis in the taxpayer's partnership interest is increased by the cost of the purchased call options but is not reduced under [Internal Revenue Code] § 752 as a result of the partnership's assumption of the taxpayer's obligation with respect to the written call options. Therefore, disregarding additional amounts contributed to the partnership, transaction costs, and any income realized and expenses incurred at the partnership level, the taxpayer purports to have a basis in the partnership interest equal to the cost of the purchased call options ($1000X in this example), even though the taxpayer's net economic outlay to acquire the partnership interest and the value of the partnership interest are nominal or zero. On the disposition of the partnership interest, the taxpayer claims a tax loss ($1,000X in this example), even though the taxpayer has incurred no corresponding economic loss.

32. Andersen, Bricolage and the Curtis Firm informed Plaintiffs that, as a condition of participating in the Leveraged Option Strategy transaction, they were required to invest in certain warrants to purchase stock of other small, high-tech companies. They further informed Plaintiffs that the non-negotiable price for the warrants would he $4,350,000, but did not even initially identify the

specific companies in which Plaintiffs would be purchasing warrants.

The Curtis Firm's Lack of Independence

33. In the course of presenting and advocating the Leveraged Option Strategy, Andersen and Bricolage recommended the Curtis Firm to Plaintiffs. Bricolage represented to Plaintiffs that the Curtis Firm could provide an independent, reliable legal opinion to substantiate the legality and validity of the Leveraged Option Strategy tax shelter.

34. The Curtis Firm is an international law firm headquartered in New York, with branch offices in the United States, Mexico, Europe and the Middle East. Founded in 1830, Curtis claims expertise in the "core practices of International Corporate Law and Litigation . . . complemented by numerous specialty areas, including Admiralty, Banking & Regulatory, Bankruptcy & Creditors' Rights, Environmental, Immigration, Intellectual Property, Real Estate, Tax and Trusts & Estates."

35. The Curtis Firm held itself out, in this matter, to be independent legal counsel that would provide Plaintiffs independent "advice and assistant regarding investments in currency options, including rendering of an opinion regarding certain tax consequences of such investments." Specifically, the Curtis Firm was to issue independent and reliable tax opinion letters to Plaintiffs opining that the Leveraged Option Strategy was properly allowable for

federal income tax purposes. Unbeknownst to Plaintiffs, however, the Curtis Firm was not independent.

36. In fact, the Curtis Firm was a co-promoter of the Leveraged Option Strategy, which role it failed to disclose to Plaintiffs.

37. Plaintiffs did not know that the Curtis Firm was the co-promoter of the Leveraged Option Strategy, and therefore deemed by the IRS as not independent. As a non-independent legal counsel, the Curtis Firm's opinion by IRS regulations and policies could not be relied upon by a taxpayer. Each Plaintiff individually signed a retainer agreement with the Curtis Firm and was subsequently billed $100,000 as a retainer for professional services to be rendered. Under the terms of their retention agreements, the Curtis Firm was to bill each Plaintiff:

> for [their] professional services at [their] customary hourly rates for paraprofessionals and professionals and for reimbursement of any and all disbursements that [they] . . . advanced on [Plaintiff's] behalf. Such billing [was to] occur in accordance with the [Curtis] Firm's customary billing practices, which generally require[d] monthly billings and require[d] payment of all fee statements within thirty (30) days after they [were] rendered.

Plaintiffs, however, never received another bill from the Curtis Firm. Instead, they were directed by Defendants to take other steps for payment.

ICA Bankrolls the Curtis Firm's Tax Shelter Business

38. Rather than accepting payment of $100,000 from each Plaintiff, the Curtis Firm required Plaintiffs to issue individual checks, made payable to IPG, to reimburse ICA for their individual $100,000 retainers that ICA paid. ICA and IPG, the president of both of which is Douglas Wolf, are represented by the Curtis Firm. However, the Curtis Firm never disclosed that business relationship to Plaintiffs.

39. Nor were Plaintiffs ever told that, at the same time that ICA paid the Curtis Firm for the tax shelter-related services to be performed on their behalf, ICA also paid the Curtis Firm for tax shelter-related services to be performed for at least five other ICA-related clients. In short, upon information and belief, ICA was financing the Curtis Firm's tax shelter business in order to ensure access to, and a steady stream of income from, wealthy individuals who they engaged in Bricolage's Leveraged Option Strategy and purchased the required warrants that ICA owned.

Plaintiffs Implement the Leveraged Option Strategy and Fulfill Their Obligation to Purchase Warrants

40. On the basis of the representations made by Andersen, Bricolage and the Curtis Firm, Plaintiffs each engaged, through their separate business entities, in Leveraged Option Strategy transactions.

41. After their Leveraged Option Strategy transactions were complete, in November, 1999, Plaintiffs formed the entity WJG Strategic Investments and, as instructed by Andersen and Bricolage, funded it with the $4,350,000 necessary to pay for the warrants in still-unidentified companies.

42. Thereafter, in November, 1999, Andersen provided Plaintiffs with information pertaining to TelEvoke, Inc. ["TelEvoke"], one of the companies in which Plaintiffs were required to purchase warrants.

43. On or about November 30, 1999, Plaintiffs, through WJG Strategic Investments, purchased the required warrant for 8% of the common stock in TelEvoke for $3,000,000 from Prism Connectivity. Only afterwards, however, did they learn that two months prior, on October 1, 1999, that warrant was owned by ICA, a company related to Prism Connectivity.

44. In December, 1999, Andersen provided Plaintiffs with information pertaining to eCryption Technologies, Inc. ["eCryption"], the second company in which Plaintiffs were required to purchase warrants.

45. On or about January 3, 2000, Plaintiffs, through WJG Strategic Investments, purchased the required warrant for 38.58% of the common stock in eCryption for $1,350,000 from Prism Connectivity. Only afterwards, however, did they learn that one month prior, on December 1, 1999, that warrant was owned by ICA.

46. Plaintiffs' warrants in both TelEvoke and eCryption were virtually worthless.

The Scheme

47. Upon information and belief, Andersen, Beer, Bricolage, Bricker, the Curtis Firm, ICA, IPG, Prism Connectivity and/or Veera had entered into an undisclosed promotion arrangement whereby each would receive a portion of the legal and other fees and costs associated with the Leveraged Option Strategy, as well as a portion of the purchase prices of the warrants, paid by Plaintiffs to Andersen, Bricolage, the Curtis Firm, ICA, IPG and/or Prism Connectivity.

The Curtis Firm's Opinion Letters Lacked Independence and Were Worthless

48. Meanwhile, on or about June 26, 2000 – without ever having met or even interviewed Plaintiffs – the Curtis Firm sent Plaintiffs individual opinion letters regarding the propriety of the Leveraged Option Strategy transaction. Each Plaintiff received a virtually identical opinion letter. In the letters the Curtis Firm advised Plaintiffs, among other things, that their entire Leveraged Option Strategy transactions were properly allowable for federal income tax purposes.

49. Upon information and belief, the opinion letters prepared for Plaintiffs by the Curtis Firm as to the tax benefits of the Leveraged Option Strategy

transaction were prepared well in advance of Andersen and Bricolage's solicitation of Plaintiffs as clients. The opinions were canned, deceptive prefabricated forms that were utilized, with minor changes based on the particular client, for each Leveraged Option Strategy transaction promoted and sold.

50. However, on December 10, 1999, shortly before Plaintiff retained the Curtis Firm, the IRS issued IRS Notice 1999-59, entitled "Tax Avoidance Using Distribution of Encumbered Property." In that notice, the IRS stated that:

> [t]he Internal Revenue Service and Treasury Department have become aware of certain types of transactions, as described below, that are being marketed to taxpayers for the purposes of generating tax losses. This notice is being issued to alert taxpayers and their representatives that the purported losses arising from such transactions are not property allowable for Federal income tax purposes. . . . Through a contrived series of steps, taxpayers claimed tax losses for capital outlays that they have in fact recovered. Such artificial losses are not allowable for Federal income tax purposes.

Thus, the clear message from the IRS was that purported losses arising from transactions wholly lacking in "economic substance" (*i.e.*, Leveraged Option Strategy) are not properly allowable for Federal income tax purposes. Yet Andersen and the Curtis

Firm diminished the importance of the notice, in order to keep their tax shelter business alive.

51. As a result of IRS Notice 1999-59, Andersen and the Curtis Firm knew or should have known that the IRS would assert that the purported losses arising from the Leveraged Option Strategy were improper and not allowable for tax purposes. At no time prior or subsequent to their implementation of the Leveraged Option Strategy, however, were Plaintiffs informed, by Andersen, Bricolage and/or the Curtis Firm, that the IRS contended that such transaction constituted an abusive tax shelter within the meaning of Code Section 6111.

52. Thereafter, on August 11, 2000, the IRS published Notice 2000-44, entitled "Tax Avoidance Using Artificially High Basis." The notice concerned "similar transactions [to those described in IRS Notice 1999-59] that purport to generate tax losses for taxpayers," thus indicating that the IRS believed it had addressed Leveraged Option Strategy-like transactions in that prior notice. More importantly, Notice 2000-44 described the precise transaction marketed by Andersen, Bricolage and the Curtis Firm to Plaintiffs as the Leveraged Option Strategy. The IRS stated that "[t]he purported losses from these transactions (and from any similar arrangements designed to produce non-economic tax losses by artificially overstating basis in partnership interest) are not allowable as deductions for federal income tax purposes." In short, the clear message from the IRS to Andersen, Bricolage and the Curtis Firm was that

the purported losses arising from the Leveraged Option Strategy are not properly allowable for federal income tax purpose. However, despite a specific inquiry by Plaintiffs regarding the potential consequences of Notice 2000-44, Andersen and the Curtis Firm again downplayed the notice to the detriment of Plaintiffs, informing them that "Notice 2000-44 more likely than not [did] not impact any of the conclusions reached in the the[ir] Opinions."

53. Andersen, Bricolage and the Curtis Firm knew or should have known, as the result of IRS Notice 2000-44 issued on August 11, 2000, if not earlier, that the purported losses arising from Plaintiffs' Leveraged Option Strategy transactions were not properly allowable for federal or state income tax purposes. Yet Andersen, Bricolage and the Curtis Firm failed to retract, modify or qualify, in any way, their advice and opinions expressed to Plaintiffs confirming the propriety of Leveraged Option Strategy.

Plaintiffs' 1999 Tax Returns, Audit and Amnesty

54. Subsequently, Andersen prepared, purportedly in accordance with professional standards, and signed Plaintiffs' 1999 tax returns. During the course of such preparation, despite the import of IRS Notices 1999-59 and 2000-44, Andersen advised Plaintiffs that their Leveraged Option Strategy transactions were legal tax shelters, and that they could properly

claim capital and ordinary losses from the Leveraged Option Strategy transactions on their tax returns for 1999. Andersen, therefore, utilized the capital and ordinary losses generated by the Leveraged Option Strategy transactions in Plaintiffs' returns. And, in reasonable reliance on the tax and legal advice rendered by Andersen and the Curtis Firm, Plaintiffs signed and timely filed their 1999 income tax returns by the applicable due dates (including all extensions).

55. A year and a half later, on March 7, 2002, the Curtis Firm circulated a memorandum to "Our Clients," including Plaintiffs, regarding IRS Announcement 2002-2, which announced a disclosure initiative whereby the federal government was offering amnesty to taxpayers who engaged in the Leveraged Option Strategy and other similar transactions [the "Amnesty Program"]. At no time, however, did the Curtis Firm recommend or advise Plaintiffs to enroll in the Amnesty Program. Nor did it disclose any of the weaknesses in its opinions, or the effect that their lack of independence had on their clients.

56. Subsequently, after seeking independent, comprehensive reviews of their entire Leveraged Option Strategy transactions, Plaintiffs each enrolled in the IRS's Announcement 2004-46 Settlement Initiative.

57. On March 1, 2005, the IRS approved a closing agreement with Carlisle and the Ohio 1999 Irrevocable ESBT, pursuant to which all outstanding issues with the federal tax authorities were resolved.

Pursuant to those agreements, they paid all taxes, penalties and interest due to federal tax authorities. Subsequently, they filed amended state tax returns and paid all taxes and interest due.

58. Bushman and the JEB Revocable ESBT, likewise, resolved all outstanding issues with federal tax authorities when the IRS approved their closing agreements on October 18, 2004. Pursuant to those agreements they paid all taxes, penalties and interest due to federal tax authorities. Subsequently, they filed amended state tax returns and paid all taxes and interest due.

59. On October 18, 2004 the IRS also approved a closing agreement with Strassel, pursuant to which all outstanding issues with the federal tax authorities were resolved. Pursuant to that agreement he paid all taxes, penalties and interest due to federal tax authorities. Subsequently, he filed amended state tax returns and paid all taxes and interest due.

Plaintiffs' Damages

60. As the result of having engaged in the Leveraged Option Strategy transactions, and having had to purchase the TelEvoke and eCryption warrants, Plaintiffs have lost millions of dollars and did not take advantage of other legitimate tax savings opportunities.

61. In conjunction with the Leveraged Option Strategy transactions, Carlisle paid fees to Bricolage

either individually and/or through his business entities. Carlisle also paid the Curtis Firm for its worthless opinion letter, interest and penalties assessed by federal tax authorities, and interest assessed by state tax authorities. He has additionally paid, and will continue to pay, attorneys, tax attorneys and accountants an as yet undetermined, but significant, amount of fees in connection with rectifying the wrong that have been perpetrated against him.

62. In conjunction with the Leveraged Option Strategy transactions, Bushman also paid fees to Bricolage either individually and/or through his business entities. He also paid the Curtis Firm for its worthless opinion letter, interest and penalties assessed by federal tax authorities, and interest assessed by state tax authorities. He has additionally paid, and will continue to pay, attorneys, tax attorneys and accountants an as yet undetermined, but significant, amount of fees in connection with rectifying the wrong that have been perpetrated against him.

63. In conjunction with the Leveraged Option Strategy transactions, Strassel paid fees to Bricolage either individually and/or through his business entities. Strassel also paid the Curtis Firm for its worthless opinion letter, interest and penalties assessed by federal tax authorities. He has additionally paid, and will continue to pay, attorneys, tax attorneys and accountants an as yet undetermined,

but significant, amount of fees in connection with rectifying the wrong that have been perpetrated against him.

64. Plaintiffs also, collectively, paid ICA, IPG and/or Prism Connectivity $3,000,000 for the worthless warrant to purchase stock in TelEvoke, and $1,350,000 for the worthless warrant to purchase stock in eCryption.

IV.

CAUSES OF ACTION

COUNT ONE – FRAUD (AGAINST ALL DEFENDANTS)

65. Plaintiffs incorporate by reference the foregoing paragraphs of the Complaint as if fully set forth herein and further allege as follows.

66. In order to induce Plaintiffs to enter into Leveraged Option Strategy transactions, pay them millions of dollars in fees, and purchase worthless warrants to purchase stock, Defendants knowingly made numerous affirmative misrepresentations to, and intentionally withheld material facts from Plaintiffs including, but not limited to, that:

- each of the transactions in which Plaintiffs engaged as part of the Leveraged Option Strategy was meaningful and imbued with non-tax considerations;

- their entire Leveraged Option Strategy transactions were properly allowable for federal income tax purposes;
- Defendants were engaged in an undisclosed, material business enterprise and conspired to create an "all or nothing" investment package that was worthless;
- the Curtis Firm had material, conflicting business relationships with Andersen, Bricolage, ICA and/or IPG, which so compromised its independence that it was rendered incapable of giving independent, unbiased opinion to which Plaintiffs were entitled;
- as a co-promoter of the Leveraged Option Strategy, the IRS would deem the Curtis Firm non-independent, thereby precluding Plaintiffs from relying upon it for independent tax advice;
- the "independent" opinion letter issued by the Curtis Firm was a canned, deceptive prefabricated form that was utilized, with minor changes based on the particular client, for each and every Leveraged Option Strategy transaction sold; and
- the owner of the warrants to purchase stock in TelEvoke and eCryption was a client of the Curtis Finn.

67. Such affirmative misrepresentations and intentional omissions of material facts were made

knowingly by Defendants with the intent to induce Plaintiffs to enter into Leveraged Option Strategy transactions, pay them millions of dollars in fees, and purchase worthless warrants to purchase stock,

68. In reasonable reliance on Defendant's affirmative misrepresentations and intentional omissions of material facts, Plaintiffs paid Defendants millions of dollars in fees, paid to execute the Leveraged Option Strategy transactions, purchased unnecessary investments to effectuate the Leveraged Option Strategy transactions, purchased worthless warrants to purchase stock, did not avail themselves of legitimate tax savings opportunities, and filed federal and state tax returns that reflected improper deductions for capital losses resulting from the Leveraged Option Strategy transactions.

69. But for Defendants' affirmative misrepresentations and intentional omissions of material facts, Plaintiffs would not have hired Defendants for advice on the Leveraged Option Strategy strategy, engaged in the Leveraged Option Strategy transactions, purchased worthless warrants to purchase stock, claimed the purportedly resulting capital losses on their income tax returns, signed and filed their tax returns as prepared by Defendants in reliance on Defendants' advice, and/or failed to avail themselves of legitimate tax savings opportunities.

70. As a result of Defendants' conduct, Plaintiffs have suffered injury in the nature of fees paid to Defendants, interest, penalties, the purchase price of

the worthless warrants to purchase stock, and additional professional fees to rectifying the wrongs perpetrated against them.

71. By reason of such acts and conduct, Plaintiffs are entitled to recover all actual damages sustained as a result of these Defendants' acts as alleged, to be proven at trial, plus punitive damages in accordance with the evidence, interest, costs and reasonable attorneys fees.

COUNT TWO - CIVIL CONSPIRACY (AGAINST ALL DEFENDANTS)

72. Plaintiffs incorporate by reference the foregoing paragraphs of the Complaint as if fully set forth herein and further allege as follows.

73. As described more fully above, Defendants knowingly acted in concert to market and implement the fraudulent and illegal business package, including the Leveraged Option Strategy and sale of warrants to purchase stock. In doing so, Defendants acted with full knowledge and awareness that the transaction was designed to give the false impressions that a complex series of financial transactions were legitimate business transactions that had economic substance from investment standpoint, when they in fact lacked those features.

74. Defendants acted in their respective roles, as described above, according to a predetermined and commonly understood and accepted plan of action, all

for the purposes of obtaining millions of dollars in professional and investment fees from Plaintiffs.

75. Defendants' acts were contrary to law.

76. There was a meeting of the minds between and among Defendants to commit the unlawful acts alleged herein. The conspiracy to commit such unlawful, overt acts proximately caused and continues to cause Plaintiffs' damages as set forth herein.

77. As a result of Defendants' conduct, Plaintiffs have suffered injury in the nature of fees paid to Defendants, taxes, interest, penalties, the purchase price of the worthless warrants to purchase stock, and additional professional fees to rectifying the wrongs perpetrated against them.

78. By reason of such acts and conduct, Plaintiffs are entitled to recover all actual damages sustained as a result of these Defendants' acts as alleged, to be proven at trial, plus punitive damages in accordance with the evidence, interest, costs and reasonable attorneys fees.

COUNT THREE – PROFESSIONAL MALPRACTICE (AGAINST THE CURTIS FIRM)

79. Plaintiffs incorporate by reference the foregoing paragraphs of the Complaint as if fully set forth herein and further allege as follows.

80. As Plaintiffs' attorneys, the Curtis Firm owed Plaintiffs a duty to exercise the degree of care,

skill and diligence commonly possessed by members of the legal community, and to comply with the applicable provisions of its code of professional responsibility.

81. The Curtis Firm failed to meet the applicable standards of care and to abide by the applicable provisions of its code of professional responsibility by, among other things:

- engaging in professional relationships that violated its professional and ethical rules of conduct;
- taking advantage of a relationship of trust and confidence in recommending the Leveraged Option Strategy;
- promoting, implementing, advising, recommending and selling an illegal, improper and invalid tax shelter that is disallowed and/or prohibited by the IRS;
- charging and collecting unreasonable, excessive and unethical fees;
- failing to disclose the actual roles of each Defendant in the Leveraged Option Strategy transaction;
- failing to disclose that Defendants were splitting and/or sharing fees;
- failing to advise Plaintiffs that the Curtis Firm was a co-promoter of the Leveraged Option Strategy;

- failing to fully and properly inform and advise Plaintiffs of IRS Notice 2000-44 and its implications on the Leveraged Option Strategy;
- failing to revise, alter, amend or modify the advice, recommendations, instructions representations, and opinions made to Plaintiffs, regarding the propriety of the Leveraged Option Strategy in light of IRS Notice 2000-44;
- failing to advise, recommend and instruct Plaintiffs to amend their tax returns in light of IRS Notice 2000-44 or otherwise;
- failing to recommend and advise Plaintiffs to enroll in the Amnesty Program in order to prevent penalties and interest;
- failing to comply with its ethical obligations to Plaintiffs;
- violating its professional rules of conduct; and
- providing erroneous legal advice and opinions.

82. But for the Curtis Firm's failure meet the applicable standard of care and to abide by the applicable provisions of its code of professional responsibility, Plaintiffs would never have hired the Curtis Firm for advice on the Leveraged Option Strategy, engaged in the Leveraged Option Strategy transactions, purchased unnecessary investments to effectuate the

Leveraged Option Strategy transaction, filed federal and state tax returns that reflected deductions for losses resulting from the Leveraged Option Strategy transactions, failed to file amended tax returns, failed to enroll in the Amnesty Program, and failed to avail themselves of other legitimate tax savings opportunities.

83. As a direct and proximate cause of the Curtis Firm's professional malpractice, Plaintiffs paid millions of dollars in fees to Defendants, taxes, interest, penalties, the purchase price of the worthless warrants to purchase stock, and additional professional fees to rectifying the wrongs perpetrated against them.

84. By reason of such acts and conduct, Plaintiffs are entitled to recover all actual damages sustained as a result of the Curtis Firm's professional malpractice as alleged, to be proven at trial, plus punitive damages in accordance with the evidence, interest, costs and reasonable attorneys fees.

COUNT FOUR - PROFESSIONAL MALPRACTICE (AGAINST ANDERSEN)

85. Plaintiffs incorporate by reference the foregoing paragraphs of the Complaint as if fully set forth herein and further allege as follows.

86. As Plaintiffs' tax advisors and accountants, Andersen owed Plaintiffs a duty to exercise the degree of care, skill and diligence commonly possessed by

members of the accounting community, and to comply with the applicable provisions of its code of professional responsibility.

87. Andersen failed to meet the applicable standard of care and to abide by the applicable provisions of its code of professional responsibility by, among other things:

- engaging in professional relationships that violated its professional and ethical rules of conduct;
- taking advantage of a relationship of trust and confidence and using its knowledge of Plaintiffs' finances to solicit Plaintiffs for the Leveraged Option Strategy;
- taking advantage of a relationship of trust and confidence in recommending the Leveraged Option Strategy;
- promoting, implementing, advising, recommending and selling an illegal, improper and invalid tax shelter that is disallowed and/or prohibited by the IRS;
- charging and collecting unreasonable, excessive and unethical fees;
- failing to disclose the actual roles of each Defendant in the Leveraged Option Strategy transaction;
- failing to disclose that Defendants were splitting and/or sharing fees;

- advising Plaintiffs that their tax returns, which utilized the losses generated by the Leveraged Option Strategy, were prepared in accordance with professional standards and pursuant to IRS guidelines and established legal authorities;
- failing to fully and properly inform and advise Plaintiffs of IRS Notice 2000-44 and its implications on the Leveraged Option Strategy;
- failing to advise, recommend and instruct Plaintiffs to amend their tax returns in light of IRS Notice 2000-44 or otherwise;
- failing to comply with its ethical obligations to Plaintiffs;
- violating its professional rules of conduct; and
- providing erroneous tax advice.

88. But for Andersen's failure meet the applicable standard of care and to abide by the applicable provisions of its code of professional responsibility, Plaintiffs would never have hired Andersen for advice on the Leveraged Option Strategy, engaged in the Leveraged Option Strategy transactions, purchased unnecessary investments to effectuate the Leveraged Option Strategy transaction, filed federal and state tax returns that reflected deductions for losses resulting from the Leveraged Option Strategy transactions,

failed to file amended tax returns, failed to enroll in the Amnesty Program, and failed to avail themselves of other legitimate tax savings opportunities.

89. As a direct and proximate cause of Andersen's professional malpractice, Plaintiffs paid millions of dollars in fees to Defendants, taxes, interest, penalties, the purchase price of the worthless warrants to purchase stock, and additional professional fees to rectifying the wrongs perpetrated against them.

90. By reason of such acts and conduct, Plaintiffs are entitled to recover all actual damages sustained as a result of Andersen's professional malpractice as alleged, to be proven at trial, plus punitive damages in accordance with the evidence, interest, costs and reasonable attorneys fees.

COUNT FIVE – BREACH OF FIDUCIARY DUTY (AGAINST ANDERSEN, BEER, BRICOLAGE, BRICKER, THE CURTIS FIRM AND VEERA)

91. Plaintiffs incorporate by reference the foregoing paragraphs of the Complaint as if fully set forth herein and further allege as follows.

92. Andersen, Beer, Bricolage, Bricker, the Curtis Firm and Veera, as Plaintiffs' tax advisors, accountants, investment advisors and attorneys, were Plaintiffs' fiduciaries and thus owed them the duties

of honesty, loyalty, care and compliance with the applicable codes of professional responsibility.

93. Andersen, Beer, Bricolage, Bricker, the Curtis Firm and Veera breached their fiduciary duties to Plaintiffs by advising them to engage in the Leveraged Option Strategy transactions, to purchase worthless warrants to purchase stock, and to sign and file the tax returns in reliance on the their advice, representations, recommendations, instructions and opinions, which they knew or should have known to be improper and illegal, all for the purpose of generating fees and income.

94. As a result of Andersen, Beer, Bricolage, Bricker, the Curtis Firm and Veera's conduct, Plaintiffs have suffered injury in the nature of fees paid to Andersen, Bricolage and the Curtis Firm, taxes, interest, penalties, the purchase price of the worthless warrants to purchase stock, and additional professional fees to rectifying the wrongs perpetrated against them.

95. By reason of such acts and conduct, Plaintiffs are entitled to recover all actual damages sustained as a result of Andersen, Beer, Bricolage, Bricker, the Curtis Firm and Veera's acts as alleged, to be proven at trial, plus punitive damages in accordance with the evidence, interest, costs and reasonable attorneys fees.

COUNT SIX – NEGLIGENCE (AGAINST ANDERSEN, BRICOLAGE AND THE CURTIS FIRM)

96. Plaintiffs incorporate by reference the foregoing paragraphs of the Complaint as if fully set forth herein and further allege as follows.

97. Andersen, Bricolage and the Curtis Firm directly or indirectly, negligently developed, structured, marketed, promoted and/or executed the Leveraged Option Strategy and purchase of stock warrants, when they knew, or in the exercise of ordinary care, should have known that the Leveraged Option Strategy would not be deemed, and the stock warrants would become worthless.

98. At all times material hereto, Andersen, Bricolage and the Curtis Firm had a duty to Plaintiffs to exercise reasonable care in advising Plaintiffs regarding potential tax saving strategies and investments.

99. Andersen, Bricolage and the Curtis Firm breached their duties and were negligent in their actions, misrepresentations, and omissions toward Plaintiffs in that they

- advised and recommended that Plaintiffs engage in the Leveraged Option Strategy;

- advised Plaintiffs that the Curtis Firm's opinion letter was an "independent" legal opinion from an "independent" law firm;
- failed to advise Plaintiff that, as a co-promoter of the Leveraged Option Strategy, the IRS was likely to deem the Curtis Firm non-independent, thereby precluding Plaintiffs from relying upon it for independent tax advice;
- failed to advise Plaintiffs that the Curtis Firm's opinion letter was not an independent legal opinion from an independent law firm;
- advised Plaintiffs that they could rely upon the Curtis Firm's opinion letter to satisfy the IRS as to the propriety of the Leveraged Option Strategy if audited;
- failed to advise Plaintiffs that the Curtis Firm had already prepared a canned, deceptive prefabricated form that was utilized, with minor changes based on the particular client, for each and every Leveraged Option Strategy transaction sold;
- advised Plaintiffs that the losses created by the Leveraged Option Strategy were legitimate, proper and in accordance with all applicable tax laws, rules and regulations;
- failed to disclose to Plaintiffs that if they filed tax returns claiming losses based

on the Leveraged Option Strategy they would be liable for penalties and interest;

- failed to adequately discuss, analyze and advise Plaintiffs regarding the effects of IRS Notice 1999-59 on the Leveraged Option Strategy;
- advised Plaintiffs that their tax returns, which utilized the losses generated by the Leveraged Option Strategy, were prepared in accordance with professional standards and pursuant to IRS guidelines and established legal authorities;
- failed to fully and properly inform and advise Plaintiffs of IRS Notice 2000-44 and its implications on the Leveraged Option Strategy;
- failed to revise, alter, amend or modify the advice, recommendations, instructions representations, and opinions made to Plaintiffs, regarding the propriety of the Leveraged Option Strategy in light of IRS Notice 2000-44;
- failed to advise, recommend and instruct Plaintiffs to amend their tax returns in light of IRS Notice 2000-44 or otherwise;
- failed to recommend and advise Plaintiffs to enroll in the Amnesty Program in order to prevent penalties and interest; and provided erroneous legal and tax advice and opinions.

100. Andersen, Bricolage and the Curtis Firm knew or should have known that the IRS would assert that the purported losses arising from the Leveraged Option Strategy were improper and not allowable for tax purposes, and that the warrants to purchase stock would become worthless. Nevertheless, these Defendants actively and aggressively developed, structured, marketed, promoted and/or executed the Leveraged Option Strategy and the sale of stock warrants.

101. As a direct and proximate cause of Andersen, Bricolage and the Curtis Firm's negligence, Plaintiffs have suffered injury in the nature of fees paid to Andersen, Bricolage and the Curtis Firm, interest, penalties, the purchase price of the worthless warrants to purchase stock, and additional professional fees to rectifying the wrongs perpetrated against them.

102. By reason of such acts and conduct, Plaintiffs are entitled to recover all actual damages sustained as a result of Andersen, Bricolage and the Curtis Firm's negligence as alleged, to be proven at trial, plus punitive damages in accordance with the evidence, interest, costs and reasonable attorneys fees.

V.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendants as follows:

A. as to their First Count (Fraud), a judgment in their favor against each Defendant, jointly and severally, actual damages in an amount to be proven at trial, plus punitive damages in accordance with the evidence, attorneys' fees, interests and costs;

B. as to their Second Count (Civil Conspiracy), a judgment in their favor against each Defendant, jointly and severally, actual damages in an amount to be proven at trial, plus punitive damages in accordance with the evidence, attorneys' fees, interests and costs;

C. as to their Third Count (Professional Malpractice), a judgment in their favor against the Curtis Firm, actual damages in an amount to be proven at trial, plus punitive damages in accordance with the evidence, attorneys' fees, interests and costs;

D. as to their Fourth Count (Professional Malpractice), a judgment in their favor against Andersen, actual damages in an amount to be proven at trial, plus punitive damages in accordance with the evidence, attorneys' fees, interests and costs;

E. as to their Fifth Count (Breach of Fiduciary Duty), a judgment in their favor against each Defendant, jointly and severally, actual damages in an amount to be proven at trial, plus punitive damages

in accordance with the evidence, attorneys' fees, interests and costs;

F. as to their Sixth Count (Negligence), a judgment in their favor against each Defendant, jointly and severally, actual damages in an amount to be proven at trial, plus punitive damages in accordance with the evidence, attorneys' fees, interests and costs; and

G. against each Defendant, actual, punitive, enhanced and exemplary damages, attorneys' fees, costs, interest and such other and further relief as the Court may deem just and proper.

March 25, 2005

Respectfully submitted,

WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A.

/s/ Stanley M. Chelsey
[by James R. Cummins w authorization]

/s/ James R. Cumming
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Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF KENTUCKY

WAYNE CARLISLE, et al.,	: CASE NO. 05-59-DLB
Plaintiffs,	: Judge Bunning
v.	: **ARTHUR ANDERSEN LLP'S MOTION TO STAY PROCEEDINGS PENDING ARBITRATION**
CURTIS, MALLET-PREVOST, COLT & MOSLE, LLP, et al.	:
Defendants.	: (Filed Jun. 10, 2005)

Pursuant to Section 3 of the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, Defendant, Arthur Andersen LLP ("Andersen"), respectfully moves the Court to stay these proceedings against Andersen pending the completion of all necessary and related arbitration proceedings.

The bases for this Motion are set forth in the attached Memorandum of Law.

Respectfully submitted,

/s/ Earle Jay Maiman
[by James D. [Illegible]
per authorization]
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Attorneys for Defendant,
Arthur Andersen LLP

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

WAYNE CARLISLE, et al.,	CASE NO. 2:05-CV-0059-DLB
Plaintiffs,	Judge David L. Bunning
v.	**DEFENDANTS CURTIS, MALLET-PREVOST, COLT & MOSLE, LLP AND WILLIAM L. BRICKER, JR.'S MOTION TO STAY PROCEEDINGS PENDING ARBITRATION, OR IN THE ALTERNATIVE, TO DISMISS COUNTS I, II, III, V, AND VI OF PLAINTIFFS' COMPLAINT**
CURTIS, MALLET-PREVOST, COLT & MOSLE, LLP, et al.	
Defendants	(Filed Jun. 10, 2005)

Pursuant to Section 3 of the Federal Arbitration Act, 9 U.S.C.A. § 3, Defendants Curtis, Mallet-Prevost, Colt & Mosle, LLP ("Curtis") and William L. Bricker, Jr. ("Bricker") move the Court for an order staying this action pending arbitration. As grounds for their motion to stay and in the interest of judicial economy, Curtis and Bricker hereby adopt and incorporate by reference the Motion to Stay Proceedings Pending Arbitration and Memorandum in Support of

Motion to Stay filed by Defendant Arthur Andersen LLP contemporaneously herewith.

Alternatively, pursuant to Fed. R. Civ. P. 12(b)(6), Curtis and Bricker move the Court to dismiss Counts I, II, III, V, and VI of Plaintiffs' Complaint as to them, with prejudice, in their entirety. Counts I, II, III, V, and VI of Plaintiffs' Complaint are barred (i) under the one-year statute of limitations provided for in KRS 413.245; or (ii), in the alternative, under the Kentucky borrowing statute, KRS 413.320, and the one-year statute of limitations provided for in Ohio Revised Code § 2305.11(A).

A memorandum in support of this motion to dismiss is attached hereto.

Respectfully submitted,

/s/ Robert Craig [by Jean B]
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Russell S. Sayre
(*Pro hac* motion pending)
Jeanne M. Bruns
(*Pro hac* motion pending)

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Counsel for Defendants
Curtis, Mallet-Prevost,
Colt & Mosle, LLP and
William L. Bricker, Jr.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

WAYNE CARLISLE, *et al.*,	:	**Case No.**
Plaintiffs,	:	**2:05-CV-059-DLB**
	:	**(Judge Bunning)**
v.	:	
CURTIS, MALLET-	:	
PREVOST, COLT &	:	
MOSLE, LLP, *et al.*,	:	
	:	
Defendants.	:	

DECLARATION OF
GARY L. STRASSEL

COMMONWEALTH OF KENTUCKY }
} SS:
COUNTY OF CAMPBELL }

Gary L. Strassel, having been duly cautioned and sworn, states as follows:

1. My name is Gary L. Strassel and I make this declaration of my own personal knowledge.

2. I, along with Wayne Carlisle, James E. Bushman and various business entities, am a plaintiff in the above-captioned action.

3. I am also the custodian of plaintiffs' documents and records pertaining to the transactions and issues described in our Complaint.

4. In June, 1999, after plaintiffs sold their heavy construction equipment business, we began

exploring methods of properly reducing taxes on gains realized from the sale. As described in the Complaint, we consulted with our tax advisor and accountant, Arthur Anderson, LLP ["Andersen"], who introduced us to Bricolage Capital, LLC ["Bricolage"].

5. In the course of presenting and advocating the Leveraged Option Strategy, Andersen and Bricolage recommended the law firm of Curtis Mallet-Prevost, Colt & Mosle, LLP ["Curtis Mallet"] to us.

6. Bricolage also provided "Descriptive Materials" relating to investment strategies, a copy of which is attached as Exhibit 1. Such materials held out Andrew D. Beer as the founder and a principal of Bricolage.

7. Ultimately, we engaged in Leveraged Option Strategy transactions, purchased warrants and suffered the damages as described in our Complaint.

8. All but one of our many meetings with Andersen pertaining to the matters described in the Complaint took place at the offices of Carlisle Construction Co., Inc., at 840 Licking Pike, in Wilder (Campbell County), Kentucky. The one meeting that did not take place in the Commonwealth took place in Cincinnati, Ohio.

9. Virtually all of the telephone calls and correspondence that Carlisle and I received from Andersen, regarding the matters described in the Complaint, were made or sent by Andersen to me at Carlisle Construction's office in Kentucky.

10. Andersen also acted as middle man for virtually all of our communications with Bricolage (*e.g.*, handling discussions and transmitting documents).

11. In conjunction with our purchase of the warrant in TelEvoke, Inc., we were provided (in Kentucky) with documentation pertaining to the warrant, including an October 1, 1999 "Preliminary Potential Option Value" prepared by Houlihan Valuation Advisors, a copy of which is attached as Exhibit 2. This valuation was addressed to Mr. Eric Sullivan, as Managing Director and General Counsel of Integrated Capital Associates, Inc. ["ICA"], located at 220 Jackson Street, Suite 2000, San Francisco, California 94111, and specifically states that:

> [o]n August 13, 1999, Integrated Capital Associates, Inc. purchased a five-year option to buy 8% of TelEvoke's common equity.

12. In conjunction with our purchase of the warrant in eCrypton Technologies, Inc., we were provided (in Kentucky) with documentation pertaining to the warrant, including a December 1, 1999 "Preliminary Potential Option Pricing" prepared by Houlihan Valuation Advisors, a copy of which is attached as Exhibit 3. This material was addressed to Prism Connectivity Ventures, c/o ICA (Europe) Limited, 18/20 North Quay, Douglas, Isle of Man IM99 1NR, British Isles.

13. On or about January 4, 2000, I sent a letter to Mr. Howard Teig, of Intercontinental Pacific

Group, Inc. ["IPG"], at 101 East 52nd Street, 33rd Floor, New York, New York 10022, transmitting $100,000 checks from Carlisle, Bushman and me, each of which was made payable to IPG for "Legal Fees Paid to Curtis Mallet-Prevost." Such checks were cashed by IPG. A copy of my January 4, 2000 letter and transmitted checks is attached as Exhibit 4. IPG cashed the checks.

14. On or about January 14, 2005, my attorney received "documents Bates numbered CMO19892-20109 and CMO22556-22727 relating to the Firm's representation of Gary Strassel," from Curtis Mallet. Included in those documents were Curtis Mallet documents identified as "Bills & Receipts," copies of which are attached as Exhibit 5.

15. On October 8, 1999, JB Cinoh, LLC, GS Noky, LLC ["GS Noky"] and WC Thomas, LLC ["WC Thomas"] each entered into a separate (but identical) Investment Management Agreement ["IMA"] with Bricolage, copies of which are attached as Exhibits 6, 7 and 8. These agreements explicitly state that the purpose of each IMA is to:

> Retain the services of [Bricolage] to provide investment management services in respect of all cash, securities and other assets and contracts comprising the investment account . . . established by the Client with [Bricolage]. . . .

16. Each IMA also contains an arbitration clause, pursuant to which the parties agreed that

"[a]ny controversy arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration. . . ."

17. Carlisle and I signed these agreements on behalf of WC Thomas and GS Noky, respectively, in the Commonwealth of Kentucky, as evidenced by the facsimile headers on Exhibits 7 and 8.

18. It was my understanding that Bricolage, as an investment advisor, was required by law to have an agreement such as the IMA with me as an investment advisee.

19. I never intended that any disputes other than those specifically related to my investment account would be arbitrated.

20. I never entered into any agreement to arbitrate with Andersen, Curtis Mallet, or any other defendant. To my knowledge, Carlisle and Bushman, likewise, never entered into any agreement to arbitrate with Andersen, Curtis Mallet, or any other defendant.

21. On or about September 25, 2002, our accountants, Deloitte & Touche, who were monitoring the status of TelEvoke and eCryption, received a voice mail message from Eric Sullivan of ICA, in which he provided updates regarding TelEvoke and eCryption. A copy of Deloitte & Touche's memorandum documenting such voice mail message is attached as Exhibit 9. I also, personally, had a number of discussion [sic] with Sullivan regarding TelEvoke and eCryption, as evidenced by my notes attached as Exhibit 10.

22. Throughout the course of our dealings with Bricolage, Bricolage regularly sent correspondence to the Commonwealth of Kentucky. Copies of a representative sampling of such correspondence is attached as Exhibit 11.

23. On or about June 7, 2004, in the course of our ongoing relationship with Curtis Mallet, our representative contacted Curtis Mallet to inquire regarding Internal Revenue Service Announcement 2004-46, issued on May 5, 2004, which gave taxpayers who invested in the Leveraged Option Strategy until June 21, 2004 to accept an IRS settlement offer to resolve their tax issues. At that time, Curtis Mallet informed our representative that it continued to stand behind its opinions, but declined to represent us in our dealing with the IRS.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Gary L. Strassel
Gary L. Strassel

Sworn to and subscribed before me, a Notary Public, this 25th day of July, 2005.

/s/ Kimberly H. Dunay
Notary Public

MY COMMISSION EXPIRES 3/3/2007

[SEAL]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

WAYNE CARLISLE, an individual, *et al.*	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 05-059-DLB**
Curtis, Mallet-Prevost, Colt & Mosle, LLP, *et al.*	)	
Defendants	)	

ALTERNATIVE JOINDER OF DEFENDANT PRISM CONNECTIVITY VENTURES, LLC IN BRICOLAGE CAPITAL, LLC'S MOTION TO STAY LITIGATION PENDING ARBITRATION

(Filed Aug. 26, 2005)

In the event that the Motion of a Prism Connectivity Ventures LLC ("PCV") to dismiss for lack of personal jurisdiction is denied, in the alternative, PCV hereby joins in the motions to stay and/or dismiss pending arbitration of Curtis, Mallet-Prevost, Colt & Mosle, LLP, Arthur Anderson [sic] LLP and Bricolage Capital, LLC, and hereby incorporate by reference all of the papers and authorities cited by the said parties, as an alternative motion of PCV.

Dated: August 26, 2005

Respectfully submitted,

ADAMS, STEPNER, WOLTERMANN & DUSING, P.L.L.C.

/s/ Donald L. Stepner
[per [Illegible]]
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41012-0861
(859) 394-6200
And

Dated: August 26, 2005

IDELL, BERMAN, SEITEL & RUTCHIK LLP

/s/ Richard J. Idell
[per [Illegible]]
Richard J. Idell
Attorneys for Defendants
INTEGRATED CAPITAL ASSOCIATES, INC., INTERCONTINENTAL PACIFIC GROUP, INC., and PRISM CONNECTIVITY VENTURES, LLC

[Certificate of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

WAYNE CARLISLE, an individual, *et al.*	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 05-059-DLB**
Curtis, Mallet-Prevost, Colt & Mosle, LLP, *et al.*	)	
Defendants	)	

ALTERNATIVE JOINDER OF DEFENDANTS INTEGRATED CAPITAL ASSOCIATES, INC. AND INTERCONTINENTAL PACIFIC GROUP IN BRICOLAGE CAPITAL, LLC'S MOTION TO STAY LITIGATION PENDING ARBITRATION

(Filed Aug. 26, 2005)

In the event that the Motion of Integrated Capital Associates, Inc. ("ICA") and Intercontinental Pacific Group, Inc., ("IPG") to dismiss for lack of personal jurisdiction is denied, in the alternative, ICA and IPG hereby join in the motions to stay and/or dismiss pending arbitration of Curtis, Mallet-Prevost, Colt & Mosle, LLP, Arthur Anderson LLP and Bricolage Capital, LLC, and hereby incorporate by reference all of the papers and authorities cited by the said parties, as an alternative motion of ICA and IPG.

Dated: August 26, 2005

Respectfully submitted,

ADAMS, STEPNER, WOLTERMANN & DUSING, P.L.L.C.

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And

Dated: August 26, 2005

IDELL, BERMAN, SEITEL & RUTCHIK LLP

/s/ Richard J. Idell
[per [Illegible]]
Richard J. Idell
Attorneys for Defendants
INTEGRATED CAPITAL ASSOCIATES, INC., INTERCONTINENTAL PACIFIC GROUP, INC., and PRISM CONNECTIVITY VENTURES, LLC

[Certificate Of Service Omitted In Printing]

United States District Court for the
Eastern District of Kentucky
(Covington Division)
Case No. 05-cv-00059-DLB

The following three documents were attached as Exhibits D, E, and F to District Court Docket Entry No. 31.

INVESTMENT MANAGEMENT AGREEMENT

This Investment Management Agreement (the "Agreement") is effective as of October 8, 1999 and is entered into by and between JB CINOH, LLC (the "Client") and Bricolage Capital, LLC (the "Manager").

Recitals

A. Whereas, the Client desires to retain the services of the Manager to provide investment management services in respect of all cash, securities and other assets and contracts comprising the investment account ("Account") established by the Client with the Manager in the custody of a broker-dealer or bank custodian selected by the Client;

B. Whereas the Client understands that the investment program that will be used by the Manager to manage the Account involves a high degree of financial risk, including the possible loss of the entire amount of the Account;

C. Whereas the Client has the financial resources to bear the loss or illiquidity of the entire amount invested in the Account, and the Account does not comprise the Client's entire investment program;

D. Whereas the Client is a "qualified client" as defined in 17 C.F.R. § 275.205-3(d); and

E. Whereas the Client is a sophisticated investor experienced in business and investment matters and receives tax, legal and accounting advice with respect to the Client's investments generally and in respect of the Account from persons other than the Manager.

NOW, THEREFORE, in consideration of the mutual agreements herein made, the Client and the Manager agree as follows:

1. *APPOINTMENT OF THE MANAGER.* The Client hereby retains the Manager as investment advisor to manage and supervise the Account according to the terms and conditions provided herein, and the Manager accepts this retention.

2. *DISCRETIONARY MANAGEMENT.* (a) The Client hereby authorizes the Manager to manage and supervise, on a full discretionary basis, the investment of assets that are from time to time allotted to the Account, after taking into account reinvestments, additions, substitutions and withdrawals. Investments may be of any kind, including, but not limited to, bank deposits, commercial paper, or other money market instruments, debt or equity securities or instruments, currencies, swap agreements, options contracts, or other derivative instruments or contracts of any nature whatsoever, common and preferred stocks; convertible stocks or bonds; warrants; options or rights; insurance contracts; corporate, municipal or government bonds, notes or bills; interests in investment companies; interests in private

investment funds, other instruments; repurchase or reverse repurchase agreements for any of the foregoing. The Manager is authorized to acquire or enter into investments and contracts for the Account that are denominated in US or foreign currency, issued by U.S. or foreign entities or counterparties, and that may be registered or unregistered under U.S. or foreign securities laws. The Manager is authorized to enter into transactions for the Account with or through any market, broker, dealer, bank, issuer or counterparty agency location anywhere in the world. The Manager is authorized to acquire or enter into illiquid positions for the Account in assets or contracts that cannot be readily converted into cash in the short term. The Manager is authorized to enter into transactions on behalf of the Account where the potential liability of the Account and of the Client is not limited to the amount of the initial investment, deposit, margin or other payment. The Manager is authorized to borrow or incur leverage on behalf of the Account to acquire assets or make payments due from the Account to a counterparty. The Manager may hold all or a portion of the Account assets in cash or cash equivalents. The Client understands the investment strategy intended to be followed with respect to the Account and hereby consents to the use of that investment strategy. The Client understands that there is no guarantee that these objectives will be achieved. In connection with its services being provided hereunder, the Manager is entitled to rely on the financial and other information provided by the Client. The Client will advise the Manager

promptly, in writing, of any changes in its objectives or guidelines, any special liquidity needs or any material change in the Client's circumstances that might affect the management of the Account. The Client will make due allowance for the time which the Manager shall require in order to reflect the changes.

(b) The Client hereby appoints the Manager as attorney-in-fact, with full authority to buy, sell or otherwise make investments for the Account. The Client hereby agrees to execute and deliver any documents that are requested by the Manager as necessary or desirable to evidence or exercise this authority. This trading authorization is a continuing one and shall remain in full force and effect until terminated by the Client in writing.

3. *CUSTODIAN.* The Account's assets shall be held by a custodian (the "Custodian") bank, trust company or broker-dealer duly appointed by the Client. The Manager is authorized to give instructions to the Custodian with respect to all investment decisions regarding the Account. A separate custody fee may be charged to the Account by the Custodian. The Manager shall not be liable for any act or omission of the Custodian.

4. *FEES.* (a) Investment management fees for services rendered hereunder shall be computed based on the value of the net assets in the account as of the close of the last business day of each quarter, and shall be paid quarterly in arrears according to the

Fee Schedule set forth in Exhibit A to this Agreement. If the Manager serves for less than a complete quarterly period, its fee shall be based upon the value of the net assets in the Account as of the last business day during the quarter in which the Manager serves as investment adviser for the Account and pro-rated for the period of the quarter for which it has served as investment adviser. The Client understands that all brokerage commissions, mark-ups, margin interest, stock transfer fees and other similar charges incurred in connection with transactions on behalf of the Account will be paid out of the assets in the Account and are in addition to the investment management fees paid to the Manager.

(b) The Client shall pay any investment management fees due hereunder directly to the Manager in accordance with the terms of the Fee Schedule.

(c) The Client understands that a portion of the fee payable hereunder may be paid by the Manager to employees of the Manager and its affiliates, and others, who introduced the Client to the Manager or who may provide supplemental and client-related services. The payment may be made so long as this Agreement remains in effect.

5. *LIABILITIES OF THE MANAGER.* Investments, contracts and transactions conducted by the Manager for the Client's Account are for the account and risk of the Client and are not guaranteed by the Manager. Neither the Manager nor any of its officers, directors,

employees or agents shall be liable for any loss, expense, cost or liability arising out of any error in judgment or any action or omission hereunder, including any instruction given to the Custodian by anyone other than an officer, director, employee or agent of the Manager, unless arising out of their negligence, malfeasance or bad faith. The Manager may rely on any notice or communication (written or oral) reasonably believed by it to be genuine. These limitations shall not act to relieve the Manager from any responsibility or liability for any responsibility, obligation or duty that the Manager may have under state statutes or any federal securities laws which is not waivable hereby.

6. *DESIGNATION OF BROKERS.* (a) Except to the extent otherwise directed pursuant to Section 6(b) hereof, the Client hereby delegates to the Manager the sole and exclusive authority to designate brokers and dealers to effect transactions for the Account. In selecting brokers and dealers, the Manager will consider the full range and quality of a broker's or dealer's services. Factors considered by the Manager in selecting brokers and dealers may include the following: price; the broker's or dealer's facilities; the broker's or dealer's reliability and financial responsibility; when relevant, the ability of the broker or dealer to effect securities transactions, particularly with regard to such aspects as timing, order size and execution of orders; and the research and other services provided by that broker or dealer to the Manager (and the Manager's arrangements relating

thereto) that are expected to enhance the Manager's general portfolio manager capabilities, notwithstanding that a client may not be the direct or exclusive beneficiary of those services. While the Manager generally seeks the best price in placing orders, the Client may not necessarily be paying the lowest price available. Commission rates are one factor considered together with other factors. The Manager will not be obligated to seek in advance competitive bidding for the most favorable commission rate applicable to any particular transaction for the Account or to select any broker-dealer on the basis of its purported "posted" commission rate. The Manager, in its discretion, may cause the Account to pay a commission for effecting a transaction for the Account in excess of the amount another broker or dealer would have charged for effecting that transaction. This may be done where the Manager has determined in good faith that such commission is reasonable in relation to the value of the brokerage and/or research provided by the broker to the Manager.

(b) If the Client wishes to direct the Manager to use a particular broker-dealer to effect some or all of the transactions on behalf of the Account, the Client shall so instruct the Manager in writing and shall provide the Manager with the name of such authorized broker-dealer and the commission rates negotiated with that broker-dealer. Any initial designation by the Client to use a particular broker-dealer along with the commission rates negotiated by the Client with that broker-dealer is set forth in Exhibit

B to this Agreement. If so directed by the Client to use a particular broker-dealer, (i) the Manager will not seek to negotiate the commission rates charged by such broker-dealer, (ii) the Client may pay higher transaction costs, including commissions, than it otherwise would had it not designated a particular broker-dealer, and (iii) the Client may be unable to obtain a more favorable price as a result of transaction volume since the directed transactions may not be included in any aggregation of other client orders. For these reasons, among others, if the Client has directed the Manager to use a particular broker-dealer, this may result in the Client receiving a less favorable execution.

7. *AFFILIATED FUNDS.* (a) The Client understands that the Manager may sponsor and provide administrative, advisory and other services to private investment funds, and that the Manager or its employees or affiliates may have an ownership interest in such funds. Client understands that the Account will not be invested in such a fund sponsored or advised by the Manager unless the Client approves such investment on a case-by-case basis.

(b) The Client hereby authorizes the Manager to effect agency cross transactions for the Account (*i.e.*, the purchase of securities from or the sale of securities to a private investment fund client of the Manager); *provided*, that the Manager may not effect agency cross transactions between the Account and the account of a private fund or another discretionary client of the Manager unless the Client expressly

consents to the transaction on a case-by-case basis. The Client hereby acknowledges that, in agency cross transactions, *affiliates* of the Manager may receive compensation from parties on both sides of the transaction (the amount of which may vary), the Manager or its affiliates will have a potentially conflicting division of loyalties and responsibilities.

8. *AGGREGATION AND ALLOCATION OF ORDERS.* (a) The Client acknowledges that circumstances may arise under which although the Manager may believe that while it is both desirable and suitable that a particular security or other investment be purchased or sold for the account of more than one of the Manager's clients, there is a limited supply or demand for that security or investment. The Client acknowledges that in these instances, the Manager will seek to allocate the opportunity to purchase or sell that security or investment among client accounts, although there can be no assurance of equality of treatment among all clients or that any investment will be proportionally allocated among clients according to any particular or predetermined standards or criteria. Where, because of prevailing market conditions, it is not possible to obtain the same price or time of execution for all of the securities or other investments purchased or sold for the Client, transactions for the Client may be reported with the average price of these transactions.

(b) If the manager believes that the purchase or sale of the same security is in the best interest of more than one client, it may, but is not

obligated to, aggregate the securities to be sold or purchased to obtain favorable price to the extent permitted by applicable law. These orders may be averaged as to price and allocated as to amount according to each account's daily purchase or sale orders or some other basis. In such instances, the transaction confirmation sent to the Client will disclose the average price. Upon request, the Manager will make the underlying records reflecting the actual transaction available for the Client's inspection.

9. *NOTICES*. Until notice is given to the contrary, all notices and other communications shall be deemed effective upon receipt when sent by certified mail, return receipt requested, or hand delivered or delivered by such other method that will assure prompt receipt, to the parties at the following addresses:

If to the Manager:	*If to the Client:*
Bricolage Capital 690 Guard Hill Road Bedford NY 10506	James E. Bushman, Mgr. JB CINOH, LLC 349 Sunny Acres Dr. Cincinnati, OH 45255
Attn: Andrew Beer	Attn:

10. *DIRECTIONS TO THE MANAGER*. All directions by or on behalf of the Client to the Manager shall be in writing signed either (a) by the Client or a duly authorized officer of the Client, or (b) by a duly authorized agent of the Client; or shall be given orally and followed promptly by a written direction signed by such authorized person. The Manager shall be

fully protected in relying upon any direction in accordance with this paragraph with respect to any instruction, direction or approval of the Client, and shall be so protected also in relying upon a certification of the corporate secretary of the Client as to the then current officers of the Client, and in continuing to rely upon that certification until a subsequent certification is sent to the Manager. The Manager shall be fully protected in acting upon any instruction, instrument, certificate or paper believed by it to be given by an authorized person or believed by it to be germane and to be signed or presented by the proper person or persons, and the Manager shall be under no duty to make any investigation or inquiry as to any statement contained in any such writing but may accept the same as conclusive evidence of the truth and accuracy of the statements contained therein.

11. *REGISTRATION STATUS OF MANAGER.* The Manager represents that as of the date of this Agreement it is a registered investment adviser under the investment Advisers Act of 1940 (the "Advisers Act"). The Client acknowledges receipt of the Manager's current client disclosure brochure, Form ADV, Part II, which contains important disclosures about the Manager.

12. *REPORTS AND MEETINGS.* The Manager will furnish the Client with quarterly investment reports indicating the assets and current values for the Account and will attend meetings as appropriate and as agreed upon from time to time.

13. *ASSIGNMENT AND AMENDMENT.* This Agreement cannot be assigned (within the meaning of the Advisers Act) by either party without the consent of the other party and may only be amended by a writing signed by both parties hereto. To the extent permitted by applicable law, consent to a change in control of the Manager that is deemed to be an "assignment" for purposes of the Investment Advisers Act may be obtained through a "negative consent" process by which the Manager notifies the client in writing of the change in control of Manager and, if the Client does not object in writing within a period specified in the notice, the Client is deemed to consent to the change in control of the Manager.

14. *TERMINATION.* (a) The Client may terminate this Agreement upon thirty (30) days' prior written notice to the Manager; and the Manager may terminate this Agreement upon one hundred twenty (120) days' prior written notice to the Client. Notwithstanding the foregoing, if either party fails to comply with its obligations under this Agreement and does not cure such failure upon thirty (30) days notice from the other party, the other party may terminate this Agreement immediately upon giving notice as the expiration of the thirty (30) day cure period. If the Client has not received the disclosure brochure more than 48 hours prior to entering into this Agreement, the Client may terminate this Agreement without penalty within five business days after entering into this Agreement; *provided*, that any investment action taken by the Manager with respect to the Account

prior to that termination will be at the Client's risk. Termination will not affect the liabilities or obligations of the parties under this Agreement arising from transactions initiated prior to the termination, including the provisions regarding arbitration which shall survive any expiration or termination of this Agreement. Upon the termination of this Agreement, the Manager shall not be obligated to recommend any action with regard to, or to liquidate, the securities or other investments in the Account. The Manager reserves the right, however, to complete any transactions open as of the termination date and to retain [illegible] in the Account sufficient to effect this completion. Upon termination, the Client shall be responsible for [illegible] regarding any asset held in the Account. If the Client directs that any assets in the Account be liquidated, the costs of liquidation shall be borne by the Client. Fees will be presented to the date of termination and any unearned portion of prepaid fees will be refunded to the Client. The Client is responsible for providing the Manager with the name and address of another custodian at the time this Agreement is terminated if the Client chooses to change custody arrangements.

(b) If any provision of this Agreement is invalid or unenforceable in any jurisdiction, that provision shall not be effective in that jurisdiction, but shall not render invalid or unenforceable the remaining terms and provisions of this Agreement in that jurisdiction or affect the validity or enforceability of this Agreement in any other jurisdiction.

15. *GOVERNING LAW.* To the extent not inconsistent with federal law, this Agreement shall be governed by and construed in accordance with the laws of the State of New York (without giving effect to its choice of law or conflicts of law provisions) applicable to agreements entered into and to be performed entirely within that State.

16. *OTHER ACCOUNTS.* The Client understands that the Manager and its affiliates perform advisory services for various clients. The Manager and its affiliates may give advice to and take actions in the performance of its duties to other clients' accounts or employee accounts which may invest income of the same securities, instruments, contracts and assets recommended to the Client, which differ from the advice given, or the timing or nature of action taken, for the Client. The Manager and its affiliates may give advice to and take action in the performance of its duties to the Client which differ from the advice given, or the timing or nature of action taken, with respect to other clients' accounts or employee accounts which may invest in some of the same securities, instruments, contracts and assets recommended to the Client. The Client acknowledges that, for good commercial and legal reasons, nonpublic information that becomes available to the Manager through its relationships or for any other reason cannot be passed on to the Client or used for the benefit of the Client.

17. *ARBITRATION.* Any controversy arising out of or relating to this Agreement or the branch thereof,

shall be settled by arbitration conducted in New York, New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Any arbitration hereunder shall be before at least three arbitrators and a decision of a majority of them shall be final and binding. Any judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

18. *AUTHORITY.* The undersigned has furnished the Manager with a certified resolution authorizing the execution and delivery of this Agreement, and other operative legal documents. The Client represents that the execution and delivery of this Agreement by the undersigned shall constitute representations by the Client that the terms hereof do not violate any obligation of any kind by which the Client is bound and, if the Client is not an individual, that this Agreement has been duly authorized by appropriate action and upon execution of this Agreement will be binding upon and enforceable against the Client in accordance with its terms. The Client also represents that it is not an investment company (as that term is defined in the Investment Company Act of 1940, as amended). The Client represents that the Client is the sole owner of the assets in the Account and no other person has an ownership interest in the Account or its assets. The Client represents that no part of the Account consists of assets of any Individual Retirement Account, pension, profit sharing or employee benefit plan.

19. *COMPLETE AGREEMENT.* This Agreement, including the attached Exhibits, constitutes the entire agreement with respect to the relationship between the parties and supersedes all prior agreements.

By: /s/ James E. Bushman
(Signature)

Print Name JAMES E. BUSHMAN

Title: Manager, JB Cinoh, LLC.

XXX-XX-XXXX
Social Security Number or Tax ID Number

BRICOLAGE CAPITAL, LLC

By: /s/ Samyak Veera
(Signature)

Print Name: SAMYAK VEERA

Title: MANAGING DIRECTOR

EXHIBIT A

Fee Schedule

Computation of Investment Management Fee

The net market value of the Account, including cash and cash equivalents, will be computed as of the close of trading on the last business day of each quarter ending March, June, September and December. Any such valuation should not be considered a guarantee of any kind whatsoever with respect to the value of

assets in the Account. Generally, interest will be charged to the Account should the Account have a debit balance. Any debit balance will not be deducted from the Account balance for the purpose of the calculation of the investment management fee. The annual investment management fee shall be computed based on the net market value of all assets in the Account as of the close of the quarter and shall be the following:

> 37.5 basis points per quarter (a rate of 1.5% per annum)

In addition, the Manager shall receive annually in arrears a profits allocation from the Account equal to 15% of the appreciation of the aggregate net value of the assets and liabilities in the Account (excluding changes in the net value due to contributions to and withdrawals from the Account by the Client) over the preceding four calendar quarters with the first such payment to be made at the last business day of the fourth calendar quarter during which the Account has been open. If the net value of the assets and liabilities in the Account does not increase during that four calendar quarter period (excluding changes in the net value due to contributions to and withdrawals from the Account by the Client) then the Manager shall not receive a profits allocation for that period. If the Account is closed within less than four calendar quarters after the opening date, the Manager shall receive the 15% profits allocation for the period since the opening date. If the Account has been open for more than four calendar quarters and is

closed other than at the end of a four calendar quarter period, the Manager shall receive the 15% profits allocation for the period since the end of the last four calendar quarter period.

The investment management fee, payable quarterly in arrears, shall be invoiced to the Client and paid within thirty (30) days of the date of the invoice.

EXHIBIT B

Client Designated Broker-Dealers
and Commission Rates

EXHIBIT C

Form to Terminate Authorization
To Effect or Execute Securities Transactions

Dear Client:

You have retained Bricolage Capital, LLC, ("Bricolage") as investment adviser. Also, you have authorized Bricolage to effect or execute securities transactions for your account.

The authorization to Bricolage to effect or execute securities transactions for your account is terminable by you at will and without penalty. In order to terminate that authorization, you need only complete the bottom part of this letter, sign and date it, and mail a copy to:

Attn:

The authorization to effect or execute securities transactions will be terminated upon receipt by Bricolage.

Failure to return this letter will result in the continued authorization of Bricolage to effect or execute securities transactions for your account.

Bricolage Capital, LLC

TO: Bricolage Capital, LLC

Your authorization to effect or execute securities transactions on behalf of our account as indicated below is terminated effective _____ (if no date is inserted, termination will be effective upon date of receipt).

Account Number: _____

Title of Account: _____

Signature of Authorized Person: _____

Name and Title of
Authorized Person: _____

Date: _____

_____

INVESTMENT MANAGEMENT AGREEMENT

This Investment Management Agreement (the "Agreement") is effective as of October 8, 1999 and is entered into by and between WC THOMAS LLC (the "Client") and Bricolage Capital, LLC (the "Manager").

Recitals

A. Whereas, the Client desires to retain the services of the Manager to provide investment management services in respect of all cash, securities and other assets and contracts comprising the investment account ("Account") established by the Client with the Manager in the custody of a broker-dealer or bank custodian selected by the Client;

B. Whereas the Client understands that the investment program that will be used by the Manager to manage the Account involves a high degree of financial risk, including the possible loss of the entire amount of the Account;

C. Whereas the Client has the financial resources to bear the loss or illiquidity of the entire amount invested in the Account, and the Account does not comprise the Client's entire investment program;

D. Whereas the Client is a "qualified client" as defined in 17 C.F.R. § 275.205-3(d); and

E. Whereas the Client is a sophisticated investor experienced in business and investment matters and receives tax, legal and accounting advice with respect to the Client's investments generally and in respect of the Account from persons other than the Manager.

NOW, THEREFORE, in consideration of the mutual agreements herein made, the Client and the Manager agree as follows:

1. *APPOINTMENT OF THE MANAGER.* The Client hereby retains the Manager as investment advisor to manage and supervise the Account according to the terms and conditions provided herein, and the Manager accepts this retention.

2. *DISCRETIONARY MANAGEMENT.* (a) The Client hereby authorizes the Manager to manage and supervise, on a full discretionary basis, the investment of assets that are from time to time allotted to the Account, after taking into account reinvestments, additions, substitutions and withdrawals. Investments may be of any kind, including, but not limited to, bank deposits, commercial paper, or other money market instruments, debt or equity securities or instruments, currencies, swap agreements, options contracts, or other derivative instruments or contracts of any nature whatsoever, common and preferred stocks; convertible stocks or bonds; warrants; options or rights; insurance contracts; corporate, municipal or government bonds, notes or bills; interests in investment companies; interests in private

investment funds, other instruments; repurchase or reverse repurchase agreements for any of the foregoing. The Manager is authorized to acquire or enter into investments and contracts for the Account that are denominated in US or foreign currency, issued by U.S. or foreign entities or counterparties, and that may be registered or unregistered under U.S. or foreign securities laws. The Manager is authorized to enter into transactions for the Account with or through any market, broker, dealer, bank, issuer or counterparty agency location anywhere in the world. The Manager is authorized to acquire or enter into illiquid positions for the Account in assets or contracts that cannot be readily converted into cash in the short term. The Manager is authorized to enter into transactions on behalf of the Account where the potential liability of the Account and of the Client is not limited to the amount of the initial investment, deposit, margin or other payment. The Manager is authorized to borrow or incur leverage on behalf of the Account to acquire assets or make payments due from the Account to a counterparty. The Manager may hold all or a portion of the Account assets in cash or cash equivalents. The Client understands the investment strategy intended to be followed with respect to the Account and hereby consents to the use of that investment strategy. The Client understands that there is no guarantee that these objectives will be achieved. In connection with its services being provided hereunder, the Manager is entitled to rely on the financial and other information provided by the Client. The Client will advise the Manager

promptly, in writing, of any changes in its objectives or guidelines, any special liquidity needs or any material change in the Client's circumstances that might affect the management of the Account. The Client will make due allowance for the time which the Manager shall require in order to reflect the changes.

(b) The Client hereby appoints the Manager as attorney-in-fact, with full authority to buy, sell or otherwise make investments for the Account. The Client hereby agrees to execute and deliver any documents that are requested by the Manager as necessary or desirable to evidence or exercise this authority. This trading authorization is a continuing one and shall remain in full force and effect until terminated by the Client in writing.

3. *CUSTODIAN.* The Account's assets shall be held by a custodian (the "Custodian") bank, trust company or broker-dealer duly appointed by the Client. The Manager is authorized to give instructions to the Custodian with respect to all investment decisions regarding the Account. A separate custody fee may be charged to the Account by the Custodian. The Manager shall not be liable for any act or omission of the Custodian.

4. *FEES.* (a) Investment management fees for services rendered hereunder shall be computed based on the value of the net assets in the account as of the close of the last business day of each quarter, and shall be paid quarterly in arrears according to the

Fee Schedule set forth in Exhibit A to this Agreement. If the Manager serves for less than a complete quarterly period, its fee shall be based upon the value of the net assets in the Account as of the last business day during the quarter in which the Manager serves as investment adviser for the Account and pro-rated for the period of the quarter for which it has served as investment adviser. The Client understands that all brokerage commissions, mark-ups, margin interest, stock transfer fees and other similar charges incurred in connection with transactions on behalf of the Account will be paid out of the assets in the Account and are in addition to the investment management fees paid to the Manager.

(b) The Client shall pay any investment management fees due hereunder directly to the Manager in accordance with the terms of the Fee Schedule.

(c) The Client understands that a portion of the fee payable hereunder may be paid by the Manager to employees of the Manager and its affiliates, and others, who introduced the Client to the Manager or who may provide supplemental and client-related services. The payment may be made so long as this Agreement remains in effect.

5. *LIABILITIES OF THE MANAGER.* Investments, contracts and transactions conducted by the Manager for the Client's Account are for the account and risk of the Client and are not guaranteed by the Manager. Neither the Manager nor any of its officers, directors,

employees or agents shall be liable for any loss, expense, cost or liability arising out of any error in judgment or any action or omission hereunder, including any instruction given to the Custodian by anyone other than an officer, director, employee or agent of the Manager, unless arising out of their negligence, malfeasance or bad faith. The Manager may rely on any notice or communication (written or oral) reasonably believed by it to be genuine. These limitations shall not act to relieve the Manager from any responsibility or liability for any responsibility, obligation or duty that the Manager may have under state statutes or any federal securities laws which is not waivable hereby.

6. *DESIGNATION OF BROKERS.* (a) Except to the extent otherwise directed pursuant to Section 6(b) hereof, the Client hereby delegates to the Manager the sole and exclusive authority to designate brokers and dealers to effect transactions for the Account. In selecting brokers and dealers, the Manager will consider the full range and quality of a broker's or dealer's services. Factors considered by the Manager in selecting brokers and dealers may include the following: price; the broker's or dealer's facilities; the broker's or dealer's reliability and financial responsibility; when relevant, the ability of the broker or dealer to effect securities transactions, particularly with regard to such aspects as timing, order size and execution of orders; and the research and other services provided by that broker or dealer to the Manager (and the Manager's arrangements relating

thereto) that are expected to enhance the Manager's general portfolio manager capabilities, notwithstanding that a client may not be the direct or exclusive beneficiary of those services. While the Manager generally seeks the best price in placing orders, the Client may not necessarily be paying the lowest price available. Commission rates are one factor considered together with other factors. The Manager will not be obligated to seek in advance competitive bidding for the most favorable commission rate applicable to any particular transaction for the Account or to select any broker-dealer on the basis of its purported "posted" commission rate. The Manager, in its discretion, may cause the Account to pay a commission for effecting a transaction for the Account in excess of the amount another broker or dealer would have charged for effecting that transaction. This may be done where the Manager has determined in good faith that such commission is reasonable in relation to the value of the brokerage and/or research provided by the broker to the Manager.

(b) If the Client wishes to direct the Manager to use a particular broker-dealer to effect some or all of the transactions on behalf of the Account, the Client shall so instruct the Manager in writing and shall provide the Manager with the name of such authorized broker-dealer and the commission rates negotiated with that broker-dealer. Any initial designation by the Client to use a particular broker-dealer along with the commission rates negotiated by the Client with that broker-dealer is set forth in Exhibit

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(b) The Client hereby authorizes the Manager to effect agency cross transactions for the Account (*i.e.*, the purchase of securities from or the sale of securities to a private investment fund client of the Manager); *provided*, that the Manager may not effect agency cross transactions between the Account and the account of a private fund or another discretionary client of the Manager unless the Client expressly

consents to the transaction on a case-by-case basis. The Client hereby acknowledges that, in agency cross transactions, *affiliates* of the Manager may receive compensation from parties on both sides of the transaction (the amount of which may vary), the Manager or its affiliates will have a potentially conflicting division of loyalties and responsibilities.

8. *AGGREGATION AND ALLOCATION OF ORDERS.* (a) The Client acknowledges that circumstances may arise under which although the Manager may believe that while it is both desirable and suitable that a particular security or other investment be purchased or sold for the account of more than one of the Manager's clients, there is a limited supply or demand for that security or investment. The Client acknowledges that in these instances, the Manager will seek to allocate the opportunity to purchase or sell that security or investment among client accounts, although there can be no assurance of equality of treatment among all clients or that any investment will be proportionally allocated among clients according to any particular or predetermined standards or criteria. Where, because of prevailing market conditions, it is not possible to obtain the same price or time of execution for all of the securities or other investments purchased or sold for the Client, transactions for the Client may be reported with the average price of these transactions.

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obligated to, aggregate the securities to be sold or purchased to obtain favorable price to the extent permitted by applicable law. These orders may be averaged as to price and allocated as to amount according to each account's daily purchase or sale orders or some other basis. In such instances, the transaction confirmation sent to the Client will disclose the average price. Upon request, the Manager will make the underlying records reflecting the actual transaction available for the Client's inspection.

9. *NOTICES.* Until notice is given to the contrary, all notices and other communications shall be deemed effective upon receipt when sent by certified mail, return receipt requested, or hand delivered or delivered by such other method that will assure prompt receipt, to the parties at the following addresses:

If to the Manager:	*If to the Client:*
Bricolage Capital	W.C. Thomas, LLC
690 Guard Hill Road	P.O. Box 72160
Bedford NY 10506	Newport, KY 41072
Attn: Andrew Beer	Attn: Wayne Carlisle

10. *DIRECTIONS TO THE MANAGER.* All directions by or on behalf of the Client to the Manager shall be in writing signed either (a) by the Client or a duly authorized officer of the Client, or (b) by a duly authorized agent of the Client; or shall be given orally and followed promptly by a written direction signed by such authorized person. The Manager shall be fully protected in relying upon any direction in

accordance with this paragraph with respect to any instruction, direction or approval of the Client, and shall be so protected also in relying upon a certification of the corporate secretary of the Client as to the then current officers of the Client, and in continuing to rely upon that certification until a subsequent certification is sent to the Manager. The Manager shall be fully protected in acting upon any instruction, instrument, certificate or paper believed by it to be given by an authorized person or believed by it to be germane and to be signed or presented by the proper person or persons, and the Manager shall be under no duty to make any investigation or inquiry as to any statement contained in any such writing but may accept the same as conclusive evidence of the truth and accuracy of the statements contained therein.

11. *REGISTRATION STATUS OF MANAGER.* The Manager represents that as of the date of this Agreement it is a registered investment adviser under the investment Advisers Act of 1940 (the "Advisers Act"). The Client acknowledges receipt of the Manager's current client disclosure brochure, Form ADV, Part II, which contains important disclosures about the Manager.

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prior to that termination will be at the Client's risk. Termination will not affect the liabilities or obligations of the parties under this Agreement arising from transactions initiated prior to the termination, including the provisions regarding arbitration which shall survive any expiration or termination of this Agreement. Upon the termination of this Agreement, the Manager shall not be obligated to recommend any action with regard to, or to liquidate, the securities or other investments in the Account. The Manager reserves the right, however, to complete any transactions open as of the termination date and to retain [illegible] in the Account sufficient to effect this completion. Upon termination, the Client shall be responsible for [illegible] regarding any asset held in the Account. If the Client directs that any assets in the Account be liquidated, the costs of liquidation shall be borne by the Client. Fees will be presented to the date of termination and any unearned portion of prepaid fees will be refunded to the Client. The Client is responsible for providing the Manager with the name and address of another custodian at the time this Agreement is terminated if the Client chooses to change custody arrangements.

(b) If any provision of this Agreement is invalid or unenforceable in any jurisdiction, that provision shall not be effective in that jurisdiction, but shall not render invalid or unenforceable the remaining terms and provisions of this Agreement in that jurisdiction or affect the validity or enforceability of this Agreement in any other jurisdiction.

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16. *OTHER ACCOUNTS.* The Client understands that the Manager and its affiliates perform advisory services for various clients. The Manager and its affiliates may give advice to and take actions in the performance of its duties to other clients' accounts or employee accounts which may invest income of the same securities, instruments, contracts and assets recommended to the Client, which differ from the advice given, or the timing or nature of action taken, for the Client. The Manager and its affiliates may give advice to and take action in the performance of its duties to the Client which differ from the advice given, or the timing or nature of action taken, with respect to other clients' accounts or employee accounts which may invest in some of the same securities, instruments, contracts and assets recommended to the Client. The Client acknowledges that, for good commercial and legal reasons, nonpublic information that becomes available to the Manager through its relationships or for any other reason cannot be passed on to the Client or used for the benefit of the Client.

17. *ARBITRATION.* Any controversy arising out of or relating to this Agreement or the branch thereof,

shall be settled by arbitration conducted in New York, New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Any arbitration hereunder shall be before at least three arbitrators and a decision of a majority of them shall be final and binding. Any judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

18. *AUTHORITY.* The undersigned has furnished the Manager with a certified resolution authorizing the execution and delivery of this Agreement, and other operative legal documents. The Client represents that the execution and delivery of this Agreement by the undersigned shall constitute representations by the Client that the terms hereof do not violate any obligation of any kind by which the Client is bound and, if the Client is not an individual, that this Agreement has been duly authorized by appropriate action and upon execution of this Agreement will be binding upon and enforceable against the Client in accordance with its terms. The Client also represents that it is not an investment company (as that term is defined in the Investment Company Act of 1940, as amended). The Client represents that the Client is the sole owner of the assets in the Account and no other person has an ownership interest in the Account or its assets. The Client represents that no part of the Account consists of assets of any Individual Retirement Account, pension, profit sharing or employee benefit plan.

19. *COMPLETE AGREEMENT.* This Agreement, including the attached Exhibits, constitutes the entire agreement with respect to the relationship between the parties and supersedes all prior agreements.

WC Thomas, LLC

By: /s/ Wayne Carlisle
(Signature)

Print Name WAYNE CARLISLE

Title: Manager

XXX-XX-XXXX
Social Security Number or Tax ID Number

BRICOLAGE CAPITAL, LLC

By: /s/ S. Veera
(Signature)

Print Name: S. VEERA

Title: MAN. DIRECTOR

EXHIBIT A

Fee Schedule

Computation of Investment Management Fee

The net market value of the Account, including cash and cash equivalents, will be computed as of the close of trading on the last business day of each quarter ending March, June, September and December. Any such valuation should not be considered a guarantee

of any kind whatsoever with respect to the value of assets in the Account. Generally, interest will be charged to the Account should the Account have a debit balance. Any debit balance will not be deducted from the Account balance for the purpose of the calculation of the investment management fee. The annual investment management fee shall be computed based on the net market value of all assets in the Account as of the close of the quarter and shall be the following:

> 37.5 basis points per quarter (a rate of 1.5% per annum)

In addition, the Manager shall receive annually in arrears a profits allocation from the Account equal to 15% of the appreciation of the aggregate net value of the assets and liabilities in the Account (excluding changes in the net value due to contributions to and withdrawals from the Account by the Client) over the preceding four calendar quarters with the first such payment to be made at the last business day of the fourth calendar quarter during which the Account has been open. If the net value of the assets and liabilities in the Account does not increase during that four calendar quarter period (excluding changes in the net value due to contributions to and withdrawals from the Account by the Client) then the Manager shall not receive a profits allocation for that period. If the Account is closed within less than four calendar quarters after the opening date, the Manager shall receive the 15% profits allocation for the period since the opening date. If the Account has been

open for more than four calendar quarters and is closed other than at the end of a four calendar quarter period, the Manager shall receive the 15% profits allocation for the period since the end of the last four calendar quarter period.

The investment management fee, payable quarterly in arrears, shall be invoiced to the Client and paid within thirty (30) days of the date of the invoice.

EXHIBIT B

Client Designated Broker-Dealers
and Commission Rates

EXHIBIT C

Form to Terminate Authorization
To Effect or Execute Securities Transactions

Dear Client:

You have retained Bricolage Capital, LLC, ("Bricolage") as investment adviser. Also, you have authorized Bricolage to effect or execute securities transactions for your account.

The authorization to Bricolage to effect or execute securities transactions for your account is terminable by you at will and without penalty. In order to terminate that authorization, you need only complete

the bottom part of this letter, sign and date it, and mail a copy to:

Attn:

The authorization to effect or execute securities transactions will be terminated upon receipt by Bricolage.

Failure to return this letter will result in the continued authorization of Bricolage to effect or execute securities transactions for your account.

Bricolage Capital, LLC

TO: Bricolage Capital, LLC

Your authorization to effect or execute securities transactions on behalf of our account as indicated below is terminated effective _____ (if no date is inserted, termination will be effective upon date of receipt).

Account Number: _____

Title of Account: _____

Signature of Authorized Person: _____

Name and Title of
Authorized Person: _____

Date: _____

_____

INVESTMENT MANAGEMENT AGREEMENT

This Investment Management Agreement (the "Agreement") is effective as of October 8, 1999 and is entered into by and between GS Noky LLC (the "Client") and Bricolage Capital, LLC (the "Manager").

Recitals

A. Whereas, the Client desires to retain the services of the Manager to provide investment management services in respect of all cash, securities and other assets and contracts comprising the investment account ("Account") established by the Client with the Manager in the custody of a broker-dealer or bank custodian selected by the Client;

B. Whereas the Client understands that the investment program that will be used by the Manager to manage the Account involves a high degree of financial risk, including the possible loss of the entire amount of the Account;

C. Whereas the Client has the financial resources to bear the loss or illiquidity of the entire amount invested in the Account, and the Account does not comprise the Client's entire investment program;

D. Whereas the Client is a "qualified client" as defined in 17 C.F.R. § 275.205-3(d); and

E. Whereas the Client is a sophisticated investor experienced in business and investment matters and receives tax, legal and accounting advice with respect to the Client's investments generally and in respect of the Account from persons other than the Manager.

NOW, THEREFORE, in consideration of the mutual agreements herein made, the Client and the Manager agree as follows:

1. *APPOINTMENT OF THE MANAGER.* The Client hereby retains the Manager as investment advisor to manage and supervise the Account according to the terms and conditions provided herein, and the Manager accepts this retention.

2. *DISCRETIONARY MANAGEMENT.* (a) The Client hereby authorizes the Manager to manage and supervise, on a full discretionary basis, the investment of assets that are from time to time allotted to the Account, after taking into account reinvestments, additions, substitutions and withdrawals. Investments may be of any kind, including, but not limited to, bank deposits, commercial paper, or other money market instruments, debt or equity securities or instruments, currencies, swap agreements, options contracts, or other derivative instruments or contracts of any nature whatsoever, common and preferred stocks; convertible stocks or bonds; warrants; options or rights; insurance contracts; corporate, municipal or government bonds, notes or bills; interests in investment companies; interests in private

investment funds, other instruments; repurchase or reverse repurchase agreements for any of the foregoing. The Manager is authorized to acquire or enter into investments and contracts for the Account that are denominated in US or foreign currency, issued by U.S. or foreign entities or counterparties, and that may be registered or unregistered under U.S. or foreign securities laws. The Manager is authorized to enter into transactions for the Account with or through any market, broker, dealer, bank, issuer or counterparty agency location anywhere in the world. The Manager is authorized to acquire or enter into illiquid positions for the Account in assets or contracts that cannot be readily converted into cash in the short term. The Manager is authorized to enter into transactions on behalf of the Account where the potential liability of the Account and of the Client is not limited to the amount of the initial investment, deposit, margin or other payment. The Manager is authorized to borrow or incur leverage on behalf of the Account to acquire assets or make payments due from the Account to a counterparty. The Manager may hold all or a portion of the Account assets in cash or cash equivalents. The Client understands the investment strategy intended to be followed with respect to the Account and hereby consents to the use of that investment strategy. The Client understands that there is no guarantee that these objectives will be achieved. In connection with its services being provided hereunder, the Manager is entitled to rely on the financial and other information provided by the Client. The Client will advise the Manager

promptly, in writing, of any changes in its objectives or guidelines, any special liquidity needs or any material change in the Client's circumstances that might affect the management of the Account. The Client will make due allowance for the time which the Manager shall require in order to reflect the changes.

(b) The Client hereby appoints the Manager as attorney-in-fact, with full authority to buy, sell or otherwise make investments for the Account. The Client hereby agrees to execute and deliver any documents that are requested by the Manager as necessary or desirable to evidence or exercise this authority. This trading authorization is a continuing one and shall remain in full force and effect until terminated by the Client in writing.

3. *CUSTODIAN.* The Account's assets shall be held by a custodian (the "Custodian") bank, trust company or broker-dealer duly appointed by the Client. The Manager is authorized to give instructions to the Custodian with respect to all investment decisions regarding the Account. A separate custody fee may be charged to the Account by the Custodian. The Manager shall not be liable for any act or omission of the Custodian.

4. *FEES.* (a) Investment management fees for services rendered hereunder shall be computed based on the value of the net assets in the account as of the close of the last business day of each quarter, and shall be paid quarterly in arrears according to the

Fee Schedule set forth in Exhibit A to this Agreement. If the Manager serves for less than a complete quarterly period, its fee shall be based upon the value of the net assets in the Account as of the last business day during the quarter in which the Manager serves as investment adviser for the Account and pro-rated for the period of the quarter for which it has served as investment adviser. The Client understands that all brokerage commissions, mark-ups, margin interest, stock transfer fees and other similar charges incurred in connection with transactions on behalf of the Account will be paid out of the assets in the Account and are in addition to the investment management fees paid to the Manager.

(b) The Client shall pay any investment management fees due hereunder directly to the Manager in accordance with the terms of the Fee Schedule.

(c) The Client understands that a portion of the fee payable hereunder may be paid by the Manager to employees of the Manager and its affiliates, and others, who introduced the Client to the Manager or who may provide supplemental and client-related services. The payment may be made so long as this Agreement remains in effect.

5. *LIABILITIES OF THE MANAGER.* Investments, contracts and transactions conducted by the Manager for the Client's Account are for the account and risk of the Client and are not guaranteed by the Manager. Neither the Manager nor any of its officers, directors,

employees or agents shall be liable for any loss, expense, cost or liability arising out of any error in judgment or any action or omission hereunder, including any instruction given to the Custodian by anyone other than an officer, director, employee or agent of the Manager, unless arising out of their negligence, malfeasance or bad faith. The Manager may rely on any notice or communication (written or oral) reasonably believed by it to be genuine. These limitations shall not act to relieve the Manager from any responsibility or liability for any responsibility, obligation or duty that the Manager may have under state statutes or any federal securities laws which is not waivable hereby.

6. *DESIGNATION OF BROKERS.* (a) Except to the extent otherwise directed pursuant to Section 6(b) hereof, the Client hereby delegates to the Manager the sole and exclusive authority to designate brokers and dealers to effect transactions for the Account. In selecting brokers and dealers, the Manager will consider the full range and quality of a broker's or dealer's services. Factors considered by the Manager in selecting brokers and dealers may include the following: price; the broker's or dealer's facilities; the broker's or dealer's reliability and financial responsibility; when relevant, the ability of the broker or dealer to effect securities transactions, particularly with regard to such aspects as timing, order size and execution of orders; and the research and other services provided by that broker or dealer to the Manager (and the Manager's arrangements relating

thereto) that are expected to enhance the Manager's general portfolio manager capabilities, notwithstanding that a client may not be the direct or exclusive beneficiary of those services. While the Manager generally seeks the best price in placing orders, the Client may not necessarily be paying the lowest price available. Commission rates are one factor considered together with other factors. The Manager will not be obligated to seek in advance competitive bidding for the most favorable commission rate applicable to any particular transaction for the Account or to select any broker-dealer on the basis of its purported "posted" commission rate. The Manager, in its discretion, may cause the Account to pay a commission for effecting a transaction for the Account in excess of the amount another broker or dealer would have charged for effecting that transaction. This may be done where the Manager has determined in good faith that such commission is reasonable in relation to the value of the brokerage and/or research provided by the broker to the Manager.

(b) If the Client wishes to direct the Manager to use a particular broker-dealer to effect some or all of the transactions on behalf of the Account, the Client shall so instruct the Manager in writing and shall provide the Manager with the name of such authorized broker-dealer and the commission rates negotiated with that broker-dealer. Any initial designation by the Client to use a particular broker-dealer along with the commission rates negotiated by the Client with that broker-dealer is set forth in Exhibit

B to this Agreement. If so directed by the Client to use a particular broker-dealer, (i) the Manager will not seek to negotiate the commission rates charged by such broker-dealer, (ii) the Client may pay higher transaction costs, including commissions, than it otherwise would had it not designated a particular broker-dealer, and (iii) the Client may be unable to obtain a more favorable price as a result of transaction volume since the directed transactions may not be included in any aggregation of other client orders. For these reasons, among others, if the Client has directed the Manager to use a particular broker-dealer, this may result in the Client receiving a less favorable execution.

7. *AFFILIATED FUNDS.* (a) The Client understands that the Manager may sponsor and provide administrative, advisory and other services to private investment funds, and that the Manager or its employees or affiliates may have an ownership interest in such funds. Client understands that the Account will not be invested in such a fund sponsored or advised by the Manager unless the Client approves such investment on a case-by-case basis.

(b) The Client hereby authorizes the Manager to effect agency cross transactions for the Account (*i.e.*, the purchase of securities from or the sale of securities to a private investment fund client of the Manager); *provided*, that the Manager may not effect agency cross transactions between the Account and the account of a private fund or another discretionary client of the Manager unless the Client expressly

consents to the transaction on a case-by-case basis. The Client hereby acknowledges that, in agency cross transactions, *affiliates* of the Manager may receive compensation from parties on both sides of the transaction (the amount of which may vary), the Manager or its affiliates will have a potentially conflicting division of loyalties and responsibilities.

8. *AGGREGATION AND ALLOCATION OF ORDERS.* (a) The Client acknowledges that circumstances may arise under which although the Manager may believe that while it is both desirable and suitable that a particular security or other investment be purchased or sold for the account of the more than one of the Manager's clients, there is a limited supply or demand for that security or investment. The Client acknowledges that in these instances, Manager will seek to allocate the opportunity to purchase or sell that security or investment among client accounts, although there can be no assurance of equality of treatment among all clients or that any investment will be proportionally allocated among clients according to any particular or predetermined standards or criteria. Where, because of prevailing market conditions, it is not possible to obtain the same price or time of execution for all of the securities or other investments purchased or sold for the Client, transactions for the Client may be reported with the average price of these transactions.

(b) If the manager believes that the purchase or sale of the same security is in the best interest of more than one client, it may, but is not

obligated to, aggregate the securities to be sold or purchased to obtain favorable price to the extent permitted by applicable law. These orders may be averaged as to price and allocated as to amount according to each account's daily purchase or sale orders or some other basis. In such instances, the transaction confirmation sent to the Client will disclose the average price. Upon request, the Manager will make the underlying records reflecting the actual transaction available for the Client's inspection.

9. *NOTICES.* Until notice is given to the contrary, all notices and other communications shall be deemed effective upon receipt when sent by certified mail, return receipt requested, or hand delivered or delivered by such other method that will assure prompt receipt, to the parties at the following addresses:

If to the Manager:	*If to the Client:*
Bricolage Capital 690 Guard Hill Road Bedford NY 10506	GS Noky, LLC 6801 Mt. Vernon Avenue Cincinnati, OH 45227
Attn: Andrew Beer	Attn: Gary L. Strassel

10. *DIRECTIONS TO THE MANAGER.* All directions by or on behalf of the Client to the Manager shall be in writing signed either (a) by the Client or a duly authorized officer of the Client, or (b) by a duly authorized agent of the Client; or shall be given orally and followed promptly by a written direction signed by such authorized person. The Manager shall be fully protected in relying upon any direction in

accordance with this paragraph with respect to any instruction, direction or approval of the Client, and shall be so protected also in relying upon a certification of the corporate secretary of the Client as to the then current officers of the Client, and in continuing to rely upon that certification until a subsequent certification is sent to the Manager. The Manager shall be fully protected in acting upon any instruction, instrument, certificate or paper believed by it to be given by an authorized person or believed by it to be germane and to be signed or presented by the proper person or persons, and the Manager shall be under no duty to make any investigation or inquiry as to any statement contained in any such writing but may accept the same as conclusive evidence of the truth and accuracy of the statements contained therein.

11. *REGISTRATION STATUS OF MANAGER*. The Manager represents that as of the date of this Agreement it is a registered investment adviser under the investment Advisers Act of 1940 (the "Advisers Act"). The Client acknowledges receipt of the Manager's current client disclosure brochure, Form ADV, Part II, which contains important disclosures about the Manager.

12. *REPORTS AND MEETINGS*. The Manager will furnish the Client with quarterly investment reports indicating the assets and current values for the Account and will attend meetings as appropriate and as agreed upon from time to time.

13. *ASSIGNMENT AND AMENDMENT.* This Agreement cannot be assigned (within the meaning of the Advisers Act) by either party without the consent of the other party and may only be amended by a writing signed by both parties hereto. To the extent permitted by applicable law, consent to a change in control of the Manager that is deemed to be an "assignment" for purposes of the Investment Advisers Act may be obtained through a "negative consent" process by which the Manager notifies the client in writing of the change in control of Manager and, if the Client does not object in writing within a period specified in the notice, the Client is deemed to consent to the change in control of the Manager.

14. *TERMINATION.* (a) The Client may terminate this Agreement upon thirty (30) days' prior written notice to the Manager; and the Manager may terminate this Agreement upon one hundred twenty (120) days' prior written notice to the Client. Notwithstanding the foregoing, if either party fails to comply with its obligations under this Agreement and does not cure such failure upon thirty (30) days notice from the other party, the other party may terminate this Agreement immediately upon giving notice as the expiration of the thirty (30) day cure period. If the Client has not received the disclosure brochure more than 48 hours prior to entering into this Agreement, the Client may terminate this Agreement without penalty within five business days after entering into this Agreement; *provided*, that any investment action taken by the Manager with respect to the Account

prior to that termination will be at the Client's risk. Termination will not affect the liabilities or obligations of the parties under this Agreement arising from transactions initiated prior to the termination, including the provisions regarding arbitration which shall survive any expiration or termination of this Agreement. Upon the termination of this Agreement, the Manager shall not be obligated to recommend any action with regard to, or to liquidate, the securities or other investments in the Account. The Manager reserves the right, however, to complete any transactions open as of the termination date and to retain [illegible] in the Account sufficient to effect this completion. Upon termination, the Client shall be responsible for [illegible] regarding any asset held in the Account. If the Client directs that any assets in the Account be liquidated, the costs of liquidation shall be borne by the Client. Fees will be presented to the date of termination and any unearned portion of prepaid fees will be refunded to the Client. The Client is responsible for providing the Manager with the name and address of another custodian at the time this Agreement is terminated if the Client chooses to change custody arrangements.

(b) If any provision of this Agreement is invalid or unenforceable in any jurisdiction, that provision shall not be effective in that jurisdiction, but shall not render invalid or unenforceable the remaining terms and provisions of this Agreement in that jurisdiction or affect the validity or enforceability of this Agreement in any other jurisdiction.

15. *GOVERNING LAW.* To the extent not inconsistent with federal law, this Agreement shall be governed by and construed in accordance with the laws of the State of New York (without giving effect to its choice of law or conflicts of law provisions) applicable to agreements entered into and to be performed entirely within that State.

16. *OTHER ACCOUNTS.* The Client understands that the Manager and its affiliates perform advisory services for various clients. The Manager and its affiliates may give advice to and take actions in the performance of its duties to other clients' accounts or employee accounts which may invest income of the same securities, instruments, contracts and assets recommended to the Client, which differ from the advice given, or the timing or nature of action taken, for the Client. The Manager and its affiliates may give advice to and take action in the performance of its duties to the Client which differ from the advice given, or the timing or nature of action taken, with respect to other clients' accounts or employee accounts which may invest in some of the same securities, instruments, contracts and assets recommended to the Client. The Client acknowledges that, for good commercial and legal reasons, nonpublic information that becomes available to the Manager through its relationships or for any other reason cannot be passed on to the Client or used for the benefit of the Client.

17. *ARBITRATION.* Any controversy arising out of or relating to this Agreement or the branch thereof,

shall be settled by arbitration conducted in New York, New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Any arbitration hereunder shall be before at least three arbitrators and a decision of a majority of them shall be final and binding. Any judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

18. *AUTHORITY.* The undersigned has furnished the Manager with a certified resolution authorizing the execution and delivery of this Agreement, and other operative legal documents. The Client represents that the execution and delivery of this Agreement by the undersigned shall constitute representations by the Client that the terms hereof do not violate any obligation of any kind by which the Client is bound and, if the Client is not an individual, that this Agreement has been duly authorized by appropriate action and upon execution of this Agreement will be binding upon and enforceable against the Client in accordance with its terms. The Client also represents that it is not an investment company (as that term is defined in the Investment Company Act of 1940, as amended). The Client represents that the Client is the sole owner of the assets in the Account and no other person has an ownership interest in the Account or its assets. The Client represents that no part of the Account consists of assets of any Individual Retirement Account, pension, profit sharing or employee benefit plan.

19. *COMPLETE AGREEMENT.* This Agreement, including the attached Exhibits, constitutes the entire agreement with respect to the relationship between the parties and supersedes all prior agreements.

GS Noky, LLC

By: /s/ Gary L. Strassel
(Signature)

Print Name Gary L. Strassel

Title: Manager

XXX-XX-XXXX
Social Security Number or Tax ID Number

BRICOLAGE CAPITAL, LLC

By: /s/ Samyak Veera
(Signature)

Print Name: SAMYAK VEERA

Title: MAN. DIRECTOR

EXHIBIT A

Fee Schedule

Computation of Investment Management Fee

The net market value of the Account, including cash and cash equivalents, will be computed as of the close of trading on the last business day of each quarter ending March, June, September and December. Any such valuation should not be considered a guarantee

of any kind whatsoever with respect to the value of assets in the Account. Generally, interest will be charged to the Account should the Account have a debit balance. Any debit balance will not be deducted from the Account balance for the purpose of the calculation of the investment management fee. The annual investment management fee shall be computed based on the net market value of all assets in the Account as of the close of the quarter and shall be the following:

> 37.5 basis points per quarter (a rate of 1.5% per annum)

In addition, the Manager shall receive annually in arrears a profits allocation from the Account equal to 15% of the appreciation of the aggregate net value of the assets and liabilities in the Account (excluding changes in the net value due to contributions to and withdrawals from the Account by the Client) over the preceding four calendar quarters with the first such payment to be made at the last business day of the fourth calendar quarter during which the Account has been open. If the net value of the assets and liabilities in the Account does not increase during that four calendar quarter period (excluding changes in the net value due to contributions to and withdrawals from the Account by the Client) then the Manager shall not receive a profits allocation for that period. If the Account is closed within less than four calendar quarters after the opening date, the Manager shall receive the 15% profits allocation for the period since the opening date. If the Account has been

open for more than four calendar quarters and is closed other than at the end of a four calendar quarter period, the Manager shall receive the 15% profits allocation for the period since the end of the last four calendar quarter period.

The investment management fee, payable quarterly in arrears, shall be invoiced to the Client and paid within thirty (30) days of the date of the invoice.

EXHIBIT B

Client Designated Broker-Dealers
and Commission Rates

EXHIBIT C

Form to Terminate Authorization
To Effect or Execute Securities Transactions

Dear Client:

You have retained Bricolage Capital, LLC, ("Bricolage") as investment adviser. Also, you have authorized Bricolage to effect or execute securities transactions for your account.

The authorization to Bricolage to effect or execute securities transactions for your account is terminable by you at will and without penalty. In order to terminate that authorization, you need only complete

the bottom part of this letter, sign and date it, and mail a copy to:

Attn:

The authorization to effect or execute securities transactions will be terminated upon receipt by Bricolage.

Failure to return this letter will result in the continued authorization of Bricolage to effect or execute securities transactions for your account.

Bricolage Capital, LLC

TO: Bricolage Capital, LLC

Your authorization to effect or execute securities transactions on behalf of our account as indicated below is terminated effective _____ (if no date is inserted, termination will be effective upon date of receipt).

Account Number: _____

Title of Account: _____

Signature of Authorized Person: _____

Name and Title of
Authorized Person: _____

Date: _____

_____

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
DEC 22 2008
OFFICE OF THE CLERK

No. 08-146

IN THE

Supreme Court of the United States

ARTHUR ANDERSEN, LLP, ET AL.,
Petitioners,

v.

WAYNE CARLISLE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONERS

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December 2008

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Attorneys for Petitioners Integrated Capital Associates, Inc.; Intercontinental Pacific Group, Inc.; and Prism Connectivity Ventures, LLC

QUESTIONS PRESENTED

Under Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, state law principles of "law and equity" applicable to contracts generally govern the validity, revocability, and enforceability of a "written provision" to arbitrate. Section 3 of the FAA, 9 U.S.C. § 3, in turn provides a device to enforce arbitration rights protected under Section 2 by requiring a district court, upon the application of any party, to stay "any issue referable to arbitration under an agreement in writing for such arbitration." Section 16(a)(1)(A) of the FAA, 9 U.S.C. § 16(a)(1)(A), provides that "an appeal may be taken from an order" of a district court denying a stay application made under Section 3. The questions presented are:

(1) Whether Section 16(a)(1)(A) of the FAA provides appellate jurisdiction over an appeal from an order denying an application made under Section 3 to stay claims involving non-signatories to an arbitration agreement.

(2) Whether Section 3 of the FAA requires a district court to stay claims against non-signatories to an arbitration agreement when the non-signatories can otherwise enforce the arbitration agreement under state law principles of law and equity.

PARTIES TO THE PROCEEDING

The parties to this proceeding are the same as the parties to the proceeding in the United States Court of Appeals for the Sixth Circuit: petitioners Arthur Andersen, LLP; Curtis, Mallet-Prevost, Colt & Mosle, LLP; William L. Bricker, Jr.; Integrated Capital Associates, Inc.; Intercontinental Pacific Group, Inc.; and Prism Connectivity Ventures, LLC; and respondents Wayne Carlisle; James E. Bushman; Gary L. Strassel; WC Thomas, LLC; WC Venture Corp.; the Ohio 1999 Irrevocable ESBT of Wayne Carlisle; JB Cinoh, LLC; JEB Venture Corp.; JEB Revocable ESBT, Wayne Carlisle, Trustee; GS Noky, LLC; and WJG Strategic Investments, LLC.

Petitioners' Rule 29.6 disclosure statement is found at page ii of their petition for a writ of certiorari.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 4
A Background Legal Principles under the FAA 4
B. Factual Background 8
C. The District Court Decision 9
D. The Sixth Circuit Decision 10
SUMMARY OF THE ARGUMENT 14
ARGUMENT 18
I. THE SIXTH CIRCUIT'S INTERPRETATION OF SECTION 16(a)(1)(A) IS ERRONEOUS 18
A. Section 16(a)(1)(A) Conditions Jurisdiction Solely upon a Motion for and Denial of Relief under Section 3, Regardless of the Motion's Merit 19
B. Congress Enacted Section 16 to Allow for Immediate Interlocutory Review of All Orders Hostile to Arbitration 23

C. This Court's Decisions Teach That Appellate Jurisdiction Is Distinct from the Merits 25

D. Petitioners' Interpretation of Section 16 Furthers Judicial Efficiency 27

II. THE SIXTH CIRCUIT'S INTERPRETATION OF SECTION 3 IS ERRONEOUS 29

A. Under Section 2, State Law Principles of Law and Equity Generally Applicable to Contracts Govern the Rights and Obligations of Non-Signatories to Arbitration Agreements 31

B. State Law Principles of "Law and Equity" Allow Non-Signatories to Enforce and Be Bound to Arbitration Agreements under Myriad Theories, Including Equitable Estoppel 34

C. Nothing in Section 3 Bars Non-Signatories from Enforcing Arbitration Rights Recognized under State Law 37

CONCLUSION 43

TABLE OF AUTHORITIES

CASES

Abney v. United States,
431 U.S. 651 (1977) 29

Adams v. Ga. Gulf Corp.,
237 F.3d 538 (5th Cir. 2001) 12

Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.,
524 F.3d 1235 (11th Cir. 2008) 20, 21

Anaconda v. Am. Sugar Ref. Co.,
322 U.S. 42 (1944) 4, 6, 37

Behrens v. Pelletier,
516 U.S. 299 (1996) ..... *passim*

Bell v. Hood,
327 U.S. 678 (1946) 25

Bernhardt v. Polygraphic Co. of Am., Inc.,
350 U.S. 198 (1956) 37, 38

Blinco v. Green Tree Servicing, LLC,
366 F.3d 1249 (11th Cir. 2004) 28

Bradford-Scott Data Corp. v. Physician Computer Network, Inc.,
128 F.3d 504 (7th Cir. 1997) 24, 28

Carson v. Am. Brands, Inc.,
450 U.S. 79 (1981) 7

Chatham Shipping Co. v. Fertex S.S. Corp.,
352 F.2d 291 (2d Cir. 1965) 35

Comer v. Micor, Inc.,
436 F.3d 1098 (9th Cir. 2006) 17, 34

Daisy Mfg. Co. v. NCR Corp.,
29 F.3d 389 (8th Cir. 1994) 35

Doctor's Assocs. v. Casarotto,
517 U.S. 681 (1996) 36

DSMC Inc. v. Convera Corp.,
349 F.3d 679 (D.C. Cir. 2003) 11, 12, 13

Ehleiter v. Grapetree Shores, Inc.,
482 F.3d 207 (3d Cir. 2007) 20

Employers Ins. v. Bright Metal Specialties, Inc.,
251 F.3d 1316 (11th Cir. 2001) 35

First Options, Inc. v. Kaplan,
514 U.S. 938 (1995) 33

Fisser v. Int'l Bank,
282 F.2d 231 (2d Cir. 1960) 34, 38, 40

Genesco, Inc. v. T. Kakiuchi & Co.,
815 F.2d 840 (2d Cir. 1987) 39

Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1988) 7, 23

Hall Street Assocs. v. Mattel, Inc.,
128 S. Ct. 1396 (2008) 39

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 25

Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co.,
351 F.2d 503 (2d Cir. 1965) 35

Japan Cotton Trading Co. v. Farber,
253 N.Y.S. 290 (App. Div. 1931) 40

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,
513 U.S. 527 (1995) 27

J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.,
863 F.2d 315 (4th Cir. 1988) 35

JP Morgan Chase & Co. v. Conegie,
492 F.3d 596 (5th Cir. 2007) 35

Kan. Gas & Elec. Co. v. Westinghouse Elec. Corp.,
861 F.2d 420 (4th Cir. 1988) 7

Kimberlin v. Renasant Bank,
No. 07-6040, 2008 WL 4428417
(6th Cir. Sept. 25, 2008) 14

Mitchell v. Forsyth,
472 U.S. 511 (1985) 26

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 4, 31

Moretrench Am. Corp. v. S.J. Groves & Sons Co.,
839 F.2d 1284 (7th Cir. 1988) 7

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 6, 37

Omni Tech Corp. v. MPC Solutions Sales, LLC,
432 F.3d 797 (7th Cir. 2005) 19, 20, 22

Palcko v. Airborne Express, Inc.,
372 F.3d 588 (3d Cir. 2004) 21, 22

Perry v. Thomas,
482 U.S. 483 (1987) ..... *passim*

Roby v. Corp. of Lloyd's,
996 F.2d 1353 (2d Cir. 1993) 35

Ross v. Am. Express Co.,
478 F.3d 96 (2d Cir. 2007) 11, 12

Sandvik AB v. Advent Int'l Corp.,
220 F.3d 99 (3d Cir. 2000) 22

San Filippo v. U.S. Trust Co.,
737 F.2d 246 (2d Cir. 1984) 26

Scherk v. Alberto-Culver Co.,
417 U.S. 506 (1974) 4

Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.,
10 F.3d 753 (11th Cir. 1993) 35

Telecom Italia, SPA v. Wholesale Telecom Corp.,
248 F.3d 1109 (11th Cir. 2001) 19, 21

In re Universal Serv. Fund Tel. Billing Practice Litig.,
428 F.3d 940 (10th Cir. 2005) 11, 12, 13

Volt Info. Scis., Inc. v. Bd. of Trs.,
489 U.S. 468 (1989) 5

Will v. Hallock,
546 U.S. 345 (2006) 25

STATUTES

Federal Arbitration Act,
9 U.S.C. § 1 *et seq*.....4
9 U.S.C. § 2.....*passim*
9 U.S.C. § 3.....*passim*
9 U.S.C. § 4.....*passim*
9 U.S.C. § 16.....3
9 U.S.C. § 16(a)(1).....*passim*
9 U.S.C. § 16(a)(1)(A).....*passim*
9 U.S.C. § 16(a)(1)(B).....8, 19
9 U.S.C. § 16(b).....24
9 U.S.C. § 16(b)(1).....8, 24
9 U.S.C. § 16(b)(2).....8, 24
9 U.S.C. § 16(b)(3).....24
9 U.S.C. § 16(b)(4).....24

28 U.S.C. § 1254(1).....1

28 U.S.C. § 1292(a)(1).....7

Pub. L. No. 100-702, tit. X, § 1019(a),
102 Stat. 4671, § 15 (1988).....7

Pub. L. No. 101-650, tit. III, § 325(a)(1),
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N.Y. Civil Practice Act § 1449.....40

New York Arbitration Act of 1920,
1920 N.Y. Laws, ch. 275.....39, 40

OTHER AUTHORITIES

Charles Alan Wright et al.,
Federal Practice and Procedure
(2d ed. 1992 & 2008 Supp.).....24

H.R. Rep. No. 96,
68th Cong., 1st Sess. (1924).....5

Ian R. MacNeil,
American Arbitration Law (1992).....6, 37, 39, 40

Ian R. MacNeil et al.,
Federal Arbitration Law: Agreements, Awards and Remedies under the Federal Arbitration Act (1999) 5, 38, 41

Larry E. Edmonson,
Domke on Commercial Arbitration (3d ed. 2008) 35, 36, 39, 41

Note,
Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy,
69 Yale L.J. 847 (1960).....31

Richard A. Lord,
Williston on Contracts (4th ed. 2001) 35, 36

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32 Colum. L. Rev. 623 (1932).....40

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Oehmke Commercial Arbitration (3d ed. 2008) 35, 36, 39, 41

OPINIONS BELOW

The decision of the court of appeals is available at *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, 521 F.3d 597 (6th Cir. 2008), and is reprinted at Pet. App. 1a–12a. The district court's order denying petitioners' motions to stay under Section 3 of the Federal Arbitration Act is reprinted at Pet. App. 17a. The district court's statement from the bench explaining its reasons for denying petitioners' Section 3 motions is reprinted at Pet. App. 13a–16a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its judgment and opinion on April 9, 2008. On June 24, 2008, Justice Stevens granted petitioners' application to extend the time to file a petition for a writ of certiorari until August 7, 2008. Supreme Court Dkt. No. 07A1031. Petitioners timely filed a petition for a writ of certiorari on August 4, 2008, which this Court granted on November 7, 2008. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

9 U.S.C. § 2 provides:

> **2. Validity, irrevocability, and enforcement of agreements to arbitrate.**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out

> of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3 provides:

> **3. Stay of proceedings where issue therein referable to arbitration**
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4 provides in pertinent part:

> **4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.**
>
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 16 provides in pertinent part:

> **16. Appeals**
>
> (a) An appeal may be taken from–
>
> (1) an order–
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed[.]

> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order–
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title[.]

STATEMENT OF THE CASE

A. Background Legal Principles under the FAA

This case concerns the availability of relief under the Federal Arbitration Act ("FAA" or "Act"), 9 U.S.C. § 1 *et seq.*, when non-signatories seek to enforce the relevant arbitration agreement in federal district court.

Section 2 of the FAA, which is the Act's "centerpiece," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), provides that a "written provision" to arbitrate future controversies arising out of the contract containing the provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 was intended to overturn long-standing judicial hostility toward the specific enforcement of arbitration agreements, *Anaconda v. Am. Sugar Ref. Co.*, 322 U.S. 42, 44 (1944), and thereby "place arbitration agreements 'upon the same footing as other contracts.'" *Scherk v. Alberto-*

Culver Co., 417 U.S. 506, 511 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. at 1, 2 (1924)).

Under Section 2, courts "apply general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act." *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 475 (1989) (citing *Perry v. Thomas*, 482 U.S. 483, 492–493 n.9 (1987)). In requiring that arbitration agreements be construed according to state law principles of "law and equity" generally applicable to contracts, Section 2 of the FAA requires that the entire panoply of state law be made applicable to arbitration agreements, not just the law of contracts. *See* 1 Ian R. MacNeil et al., *Federal Arbitration Law: Agreements, Awards and Remedies under the Federal Arbitration Act* § 10.6.2, at 10:28 (1999) ("*Federal Arbitration Law*") ("It should be noted that contract law alone is an insufficient foundation for the FAA. The FAA also presupposes the existence of a whole corpus juris of general law: property, torts, agency, corporations, criminal, and regulation, to mention a few of countless possible examples.").

Section 2's broad application of state law to the interpretation of arbitration agreements is subject only to the limitation that state law not discriminate against arbitration agreements, *Perry*, 482 U.S. at 492–493 n.9, and the "federal policy favoring arbitration," under which "ambiguities as to the scope of the arbitration clause itself [are] resolved in favor of arbitration." *Volt*, 489 U.S. at 476.

Sections 3 and 4 of the FAA in turn "implement[]" the "declared policy" of Section 2. *Anaconda*, 322 U.S. at 44; *see also Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (Sections 3 and 4 of the FAA are "parallel devices for enforcing an arbitration agreement"); Ian R. MacNeil, *American Arbitration Law* 102 (1992) ("*American Arbitration Law*") ("Sections 3 and 4 are the key sections implementing the enforceability principle [of Section 2].").

Section 3 of the FAA provides a defendant sued in district court on a claim subject to an arbitration agreement with a mechanism that effectively compels specific performance: "[O]n application of one of the parties," a district court shall stay proceedings "until such arbitration has been had" if the court concludes that the "issue involved in such suit or proceeding is referable to arbitration" under "an agreement in writing for such arbitration." 9 U.S.C. § 3. "The concept seems to be that a power to grant a stay is enough without the power to order that the arbitration proceed, for, if a stay be granted, the plaintiff can never get relief unless he proceeds to arbitration." *Anaconda*, 322 U.S. at 45.

Section 4 of the FAA provides a putative arbitration plaintiff with a mechanism to compel specific performance of an arbitration agreement when the putative arbitration defendant refuses to arbitrate. Section 4 allows a "party aggrieved" by the refusal of "another to arbitrate under a written agreement for arbitration" to petition a district court which otherwise has jurisdiction "for an order

directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

As originally enacted, the FAA provided no express right of immediate appellate review of orders denying relief under Sections 3 and 4. Over time, such orders were understood as appealable in certain cases under 28 U.S.C. § 1292(a)(1), by operation of the complicated *Enelow-Ettelson* doctrine. *See, e.g.*, *Moretrench Am. Corp. v. S.J. Groves & Sons Co.*, 839 F.2d 1284, 1287 (7th Cir. 1988) (Section 3); *Kan. Gas & Elec. Co. v. Westinghouse Elec. Corp.*, 861 F.2d 420, 422 (4th Cir. 1988) (Section 4). In *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), this Court overturned the *Enelow-Ettleson* doctrine, limiting interlocutory review of Section 3 and 4 orders to only those rare cases where the order threatened "'serious, perhaps irreparable, consequence[s]'"—a difficult standard to satisfy. *See* 485 U.S. at 287–288 (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981)).

In response to *Gulfstream*, Congress amended the FAA in 1988 to provide an express right of immediate interlocutory appeal of orders denying motions to stay under Section 3 and to compel under Section 4.[1] Pub. L. No. 100-702, tit. X, § 1019(a), 102 Stat. 4671, § 15 (1988), renumbered § 16, Pub. L. No. 101-650, tit. III, § 325(a)(1), 104 Stat. 5120 (1990), codified at 9 U.S.C. § 16(a)(1). Section 16(a)(1)(A)

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[1] Although Section 3 refers to "application[s]" to stay and Section 4 refers to "petition[s]" to compel, for ease of reference petitioners hereinafter refer to all such filings as "motions" to stay or compel under the FAA.

allows an immediate interlocutory appeal from an order "refusing a stay of any action under section 3 of this title." 9 U.S.C. § 16(a)(1)(A). Similarly, Section 16(a)(1)(B) allows an immediate interlocutory appeal from an order "denying a petition under section 4 of this title to order arbitration to proceed[.]" 9 U.S.C. § 16(a)(1)(B). At the same time, Congress expressly precluded interlocutory review of orders *granting* relief under Sections 3 and 4. *See* 9 U.S.C. § 16(b)(1)–(2).

B. Factual Background

In 1999, Bricolage Capital, LLC ("Bricolage") and certain petitioners provided tax and investment advice to respondents Wayne Carlisle, James Bushman, and Gary Strassel concerning strategies designed to reduce their tax liability. Pet. App. 3a. To implement this advice, Carlisle, Bushman, and Strassel created limited liability corporations ("LLCs"), which are also respondents. Pet. App. 3a. The LLCs in turn entered into investment management agreements with Bricolage. Pet. App. 3a; J.A. 67, 86, 105. All of these agreements contained the following broad arbitration provision:

> *Any* controversy arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration conducted in New York, New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

Pet. App. 3a–4a; J.A. 80–81, 99–100, 118–119 (emphasis added). Petitioners were not signatories to the investment management agreements containing this arbitration provision.

C. The District Court Decision

In 2005, respondents brought this diversity action against Bricolage and petitioners in the Eastern District of Kentucky. Pet. App. 4a; J.A. 11. Respondents alleged that the tax advice they received was faulty and, *inter alia*, that all defendants were jointly and severally liable for damages resulting from fraud, J.A. 34–37, and civil conspiracy, J.A. 37–38. Respondents further alleged that various defendants, including Bricolage, were also jointly and severally liable for damages resulting from breach of fiduciary duty, J.A. 44–45, and negligence, J.A. 46–49.

Petitioners moved to stay respondents' claims against them pursuant to Section 3 of the FAA. J.A. 52, 54, 63, 65. In their motion,[2] petitioners argued that, under principles of equitable estoppel, the district court should stay respondents' claims against them until those claims were arbitrated pursuant to the terms of the arbitration provision contained in the investment management agreements between the LLCs and Bricolage. As petitioners argued, equitable estoppel required the arbi-

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[2] For ease of comprehension, this brief refers to petitioners' Section 3 filings as a single motion, even though petitioners actually filed multiple Section 3 motions. *See* J.A. 52, 54, 63, 65.

tration of respondents' claims against them because respondents' claims fell within the scope of the arbitration provision and alleged substantially interdependent and concerted misconduct by both the signatory (Bricolage) and the non-signatories (petitioners) to the investment management agreements containing the arbitration provision.

The district court denied petitioners' motion to stay under Section 3, concluding (1) that petitioners did not satisfy the requirements for application of equitable estoppel and thus could not enforce the arbitration provision, and (2) that respondents' claims did not fall within the scope of the arbitration provision.[3] Pet. App. 16a. Petitioners timely appealed this order to the Sixth Circuit pursuant to Section 16(a)(1)(A) of the FAA.

D. The Sixth Circuit Decision

In full merits briefing and oral argument before the Sixth Circuit, petitioners argued that the district court erred by not staying respondents' claims against them under Section 3 because (1) petitioners could enforce the arbitration provision under equitable estoppel principles, and (2) respondents' claims were within the scope of the provision. The Sixth Circuit, however, never considered these issues. *See* Pet. App. 5a ("The district court rejected

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[3] The district court also denied as moot Bricolage's own motion to stay under Section 3 because Bricolage filed for bankruptcy while its motion was pending. Pet. App. 18a–19a; Dist. Ct. Dkt. No. 73 (suggestion of bankruptcy).

the defendants' equitable-estoppel argument and denied the motion to stay for substantive reasons that need not detain us here[.]"). Instead, the Sixth Circuit dismissed petitioners' appeal for lack of appellate jurisdiction under Section 16(a)(1)(A) of the FAA. Pet. App. 12a.

At the outset, the Sixth Circuit noted that whether Section 16(a)(1) allows interlocutory appellate review of denials of Section 3 and 4 motions involving non-signatories has divided the courts of appeals. Pet. App. 5a.[4] On one side of the split, rejecting appellate jurisdiction over denials of Section 3 motions to stay claims involving non-signatories to the arbitration agreement, the Sixth Circuit identified *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003), and *In re Universal Service Fund Telephone Billing Practice Litigation*, 428 F.3d 940 (10th Cir. 2005). *See* Pet. App. 7a. On the other side of the circuit split, upholding appellate jurisdiction over denials of Section 3 motions to stay claims involving non-signatories to the arbitration agreement, the Sixth Circuit identified *Ross v.*

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[4] In passing, the Sixth Circuit erroneously asserted that petitioners had not actually invoked Section 3 in the district court. *See* Pet. App. 5a ("The defendants now seek appellate review of that denial, for the first time invoking Section 3 of the Federal Arbitration Act in an effort to establish interlocutory jurisdiction under Section 16 of the Act."). Nevertheless, the Sixth Circuit decided the case as if petitioners had invoked Section 3 in the district court, which in fact petitioners expressly did. *See* J.A. 52, 54, 55, 57.

American Express Co., 478 F.3d 96 (2d Cir. 2007). Pet. App. 7a.

With little elaboration, the Sixth Circuit then followed *DSMC* and *Universal Service Fund*. Pet. App. 10a. The Sixth Circuit criticized *Ross* for relying on other circuits that had exercised appellate jurisdiction under Section 16(a)(1)(A) in cases involving non-signatories without explaining their reason for doing so. *See* Pet. App. 10a–11a.

In *DSMC*, the D.C. Circuit (Roberts, J.) determined the issue of appellate jurisdiction under Section 16(a)(1) by holding that, as a matter of law, neither Section 3 nor Section 4 of the FAA applies to claims involving non-signatories to an arbitration agreement. As to Section 4, the court reasoned that the applicable test is "whether the parties are *signatories* to a written agreement." 349 F.3d at 683 (emphasis added). The court applied the same reasoning to Section 3: "'The denial of the benefit of the mandatory stay provision to *non-signatories* has been grounded in the recognition that the non-signatory's litigation with an arbitrating party cannot be referred to arbitration.'" *Id.* at 684 (quoting *Adams v. Ga. Gulf Corp.*, 237 F.3d 538, 540 (5th Cir. 2001)) (emphasis added). *DSMC* thus stands for two related propositions: first, that Sections 3 and 4 of the FAA do not apply to claims involving non-signatories; and second, that Section 16(a)(1) does not allow interlocutory appellate review of denials of Section 3 and 4 motions involving claims of non-signatories.

In *Universal Service Fund*, the Tenth Circuit followed *DSMC* and held that it lacked appellate jurisdiction over an appeal from denials of Section 3 and 4 motions brought by non-signatories. The Tenth Circuit reasoned: "[W]hether Defendants are appealing from the district court's denial of a stay or its refusal to compel arbitration, the plain language of the applicable jurisdictional statute mandates Defendants' prior reliance upon a *written agreement* to arbitrate as a condition precedent to our jurisdiction." 428 F.3d at 942 (emphasis in original). Because the Tenth Circuit agreed with the D.C. Circuit's conclusion that a non-signatory could not satisfy the "written agreement" requirement, it dismissed the appeal for lack of jurisdiction under Section 16(a)(1).

Given that the Sixth Circuit in this case adopted the reasoning of *DSMC* and *Universal Service Fund*, and that *Universal Service Fund* followed the reasoning of *DSMC*, the Sixth Circuit decision must be read as holding that, as a matter of law, Section 3 does not allow a district court to stay claims against non-signatories, even if the non-signatories can otherwise enforce the arbitration agreement under state law principles of law and equity, including equitable estoppel. Put another way, like the D.C. Circuit in *DSMC*, the Sixth Circuit collapsed the jurisdictional analysis under Section 16(a)(1)(A) into its merits analysis of the Section 3 motion. This reading is confirmed by the first paragraph of the Sixth Circuit decision, which states that "none of the defendants involved in this appeal was a *signatory* to the written arbitration agreement in question. . . .

In the absence of an applicable written agreement to arbitrate, the plaintiffs contend that Section 3 is inapplicable in this action . . . . We agree." Pet. App. 2a–3a (emphasis added).

Hence, although the Sixth Circuit's decision is ostensibly denominated as a dismissal for lack of *appellate jurisdiction*, in substance it established a categorical rule regarding Section 3 motions made to stay claims against non-signatories. Indeed, since the decision below, the Sixth Circuit has extended its categorical rule to Section 4 motions to compel arbitration of claims against non-signatories. *See Kimberlin v. Renasant Bank*, No. 07-6040, 2008 WL 4428417 (6th Cir. Sept. 25, 2008).

SUMMARY OF THE ARGUMENT

The Sixth Circuit committed two errors of statutory interpretation, first as to Section 16(a)(1)(A), and then as to Section 3. This Court should reverse both errors and remand this case to the Sixth Circuit to consider petitioners' arguments that respondents' claims are "referable to arbitration" under the doctrine of equitable estoppel.

1. The Sixth Circuit erred by deciding appellate jurisdiction under Section 16(a)(1)(A) by reference to its *merits* determination that Section 3 does not apply as a matter of law to claims involving non-signatories.

a. The text of Section 16(a)(1)(A) conditions appellate jurisdiction upon only two elements: first, that the appellant sought relief under Section 3, and

second, that the district court denied such relief. Petitioners satisfy that simple test, as they moved under Section 3 and the district court denied their motion. Any purported substantive defect in petitioners' Section 3 motion speaks only to the merits of petitioners' request for Section 3 relief, and is therefore irrelevant to the question of appellate jurisdiction.

b. Petitioners' textual reading of Section 16(a)(1) is confirmed by the structure of the FAA's provisions for appellate review, under which all orders hostile to arbitration under Sections 3 and 4 are immediately appealable whereas all Section 3 and 4 orders favorable to arbitration are not. By its interpretation of Section 16, the Sixth Circuit in effect created a new subcategory of banned interlocutory appeals—a subcategory absent from the text of Section 16.

c. Petitioners' interpretation of Section 16(a)(1) is further supported by this Court's decision in the analogous context of immunity appeals in *Behrens v. Pelletier*, 516 U.S. 299 (1996), under which appellate jurisdiction is determined "by focusing upon the category of orders appealed from, rather than upon the strength of the grounds for reversing the order." *Id.* at 311. The Sixth Circuit's analysis inverts the *Behrens* test by focusing not on the category of order appealed from (denials of Section 3 motions) but instead on the merits of an appellant's arguments for reversal.

d. Finally, petitioners' interpretation of Section 16(a)(1) is supported by considerations of judicial

efficiency. Petitioners' theory establishes a clear, bright-line test for appellate jurisdiction: was Section 3 relief sought and denied? This test should not disrupt district courts or burden courts of appeals with groundless Section 16 appeals. In *Behrens*, this Court approved of procedures adopted in several circuits for district courts to certify appeals as frivolous, thereby permitting district courts to retain jurisdiction pending appeal. Courts of appeals, for their part, retain their inherent authority to use summary procedures to weed out groundless appeals.

2. The Sixth Circuit also erred in its interpretation of Section 3. According to the Sixth Circuit, petitioners' Section 3 motion failed as a matter of law because there was no "written agreement to arbitrate" in view of petitioners' status as "[non-]signator[ies] to the written agreement in question." Pet. App. 2a, 3a.

a. The centerpiece of the FAA is Section 2, under which state law principles of "law and equity" generally applicable to contracts dictate the validity, revocability, and enforceability of arbitration provisions. In *Perry v. Thomas*, 482 U.S. 483 (1987), this Court recognized that whether a non-signatory can invoke a written arbitration provision turns not on the text of the FAA, but on state law principles made applicable by Section 2; whether the "arbitration provision inures to the benefit" of the non-signatory is determined under such state law principles. *Id.* at 492–493 & n.9. Thus, state law principles of "law and equity," and not Section 3,

control whether petitioners may enforce the arbitration agreement.

b. It is indisputable that "hundreds of years of common law" recognize that "non-parties" may enforce or be bound by contracts. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.10 (9th Cir. 2006) (Kozinski, J.). Applying such principles, courts have routinely held that non-signatories may enforce or be bound to arbitration agreements under myriad theories, including equitable estoppel. Similarly, scholarly treatises on contract law and commercial arbitration devote entire chapters to the various common law theories by which non-signatories may enforce or be bound to arbitration agreements. Thus, by exempting arbitration agreements from such ordinary common law rules applicable to contracts, the Sixth Circuit's categorical rule runs contrary to the very purpose of Section 2: to place arbitration agreements on an equal footing with other contracts.

c. The Sixth Circuit's reliance on Section 3 was therefore misplaced because Section 3 is merely a mechanism for enforcing state law rights recognized and protected by Section 2. Section 2, and the state law principles it applies, resolve the issue of a non-signatory's rights and obligations under an arbitration agreement subject to the FAA. Although Section 3 certainly requires the existence of a written arbitration agreement, nothing in Section 3 or Section 2 requires that the arbitration agreement be signed. History confirms this reading of the statute, as Congress modeled the FAA on less-strict provisions of New York arbitration law not requiring

signatures, in contrast to a stricter provision of New York law requiring signatures and other formalities for certain arbitration agreements. Finally, the absence of a signature requirement under the FAA reflects the often informal nature of regular commercial practices and concern about the dampening effect upon arbitration from excessive formalities.

ARGUMENT

I. THE SIXTH CIRCUIT'S INTERPRETATION OF SECTION 16(a)(1)(A) IS ERRONEOUS.

The Sixth Circuit first erred by rejecting jurisdiction over petitioners' appeal based on its evaluation of the *merits* of petitioners' Section 3 motions. All that the text of Section 16(a)(1)(A) requires for appellate jurisdiction is that an appeal be taken from an order denying a motion to stay under Section 3—precisely what petitioners did here. In addition to contradicting Section 16's text, the Sixth Circuit decision is inconsistent both with Congress's pro-arbitration intent and this Court's decisions distinguishing between appellate jurisdiction and the merits of a dispute. Finally, petitioners' interpretation of Section 16(a)(1) furthers judicial efficiency by establishing a clear, bright-line test for appellate jurisdiction.

A. Section 16(a)(1)(A) Conditions Jurisdiction Solely upon a Motion for and Denial of Relief under Section 3, Regardless of the Motion's Merit.

1. Appellate jurisdiction over Section 3 appeals is governed by Section 16(a)(1)(A), which provides in full:

> (a) An appeal may be taken from –
> (1) an order –
> (A) refusing a stay of any action under section 3 of this title[.]

9 U.S.C. § 16(a)(1)(A).[5] On its face, this section conditions jurisdiction upon only two requirements: (1) that the appellant filed a motion seeking a Section 3 stay, and (2) that the district court denied the requested stay. As Judge Easterbrook explained in *Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797 (7th Cir. 2005), "Appellate jurisdiction under § 16(a)(1)(A) depends on the existence (and denial) of a motion for stay pending arbitration, *not on the movant being correct*. If a § 3 motion is made and denied, then appellate jurisdiction exists to determine whether the denial was proper." *Id.* at 800 (emphasis added); *see also Telecom Italia, SPA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1114 (11th Cir. 2001).

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[5] Although Section 4 and its corresponding provision for appellate review, Section 16(a)(1)(B), are not at issue in this case, this Court's decision in this case should also govern them as well, as there are no meaningful distinctions between the two jurisdictional provisions.

Tellingly, Section 16 makes no reference to the underlying merits of the stay request. Rather, the statute provides jurisdiction so long as the appellant has made a mere "*contention* that the contract provides for 'arbitration,'" regardless of the substance of that claim. *Omni Tech*, 432 F.3d at 800 (emphasis in original); *see also Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1238 (11th Cir. 2008) ("That [appellant] might not be entitled to a § 3 stay on the merits hardly means it did not request one."). Thus, Section 16(a)(1)(A) provides for jurisdiction so long as the appellant's motion *alleges* entitlement to a Section 3 stay. *See Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 212 (3d Cir. 2007).

It is beyond dispute that petitioners have satisfied this simple textual mandate. Petitioners moved to stay the district court proceedings under Section 3 of the FAA. J.A. 52, 54, 63, 65. The district court, in turn, denied petitioners' motions on the merits. Pet. App. 16a. As a result, petitioners have fulfilled Section 16's requirements in their entirety.

2. To circumvent Section 16's plain text, respondents argued below that petitioners' motion was not *actually* a Section 3 motion—notwithstanding that it requested relief under Section 3 and the district court denied relief under Section 3—because petitioners relied upon equitable estoppel principles to claim rights under the arbitration provision. Resp. C.A. Br. at 16–17. According to respondents, petitioners' reliance on equitable estoppel means that they have not satisfied Section 3's "agreement

in writing" requirement, thereby taking the district court's order outside the reach of the FAA's provision of interlocutory review. Resp. C.A. Br. at 16–17. Yet respondents' argument merely raised a potential defect in the *merits* of petitioners' Section 3 claim, no different from any other argument relating to the merits of petitioners' Section 3 motion. *See, e.g.*, *Advanced Bodycare*, 524 F.3d at 1238 (stating, in response to similar contention, "[t]his argument merely duplicates the merits, and we reject it"). Such an argument therefore cannot circumvent Section 16's clear statutory language.

In other contexts, courts of appeals have repeatedly recognized that arguments concerning the merits of Section 3 and 4 motions cannot defeat appellate jurisdiction under Section 16(a)(1). By definition, any interlocutory appeal under Section 16(a)(1) will only arise after a district court has denied the appellant's Section 3 or Section 4 motion. Section 16 thus gives the courts of appeals jurisdiction over those disputed cases, in order to allow them to review the *merits* of the dispute quickly and efficiently. *See, e.g.*, *Telecom Italia*, 248 F.3d at 1114 ("Whether or not the District Court was correct in ruling against arbitration, its ruling denied a requested stay of the action pending arbitration and was for that reason appealable."). Any contrary rule would create a paradox, in which the resolution of the merits of a Section 16(a)(1) appeal might retroactively strip the court of the jurisdiction necessary to reach the issue in the first place. *See Palcko v. Airborne Express, Inc.*, 372 F.3d

588, 592 (3d Cir. 2004) (discussing circularity of such an interpretation of Section 16(a)(1)).

The firewall between appellate jurisdiction and the underlying merits remains intact even when the alleged defect in the Section 3 or Section 4 motion is that the dispute is outside the scope of the FAA's coverage. For example, challenges to the validity of an arbitration agreement—in essence, that the case lacks an "agreement in writing" as required by the FAA—do not remove Section 16(a)(1) jurisdiction over the interlocutory appeal of a denied motion for stay or to compel arbitration. *See, e.g., Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 102–104 (3d Cir. 2000) (Becker, C.J.) (Section 16(a)(1) confers appellate jurisdiction over a denial of a motion to compel arbitration even when the existence of an agreement to arbitrate is disputed). Similarly, arguments that a given agreement calls for a non-arbitral dispute resolution process, thus bringing it outside the scope of the FAA's coverage, have not served to defeat appellate jurisdiction. *See Omni Tech*, 432 F.3d at 798–800. Indeed, even contentions that the contract containing an arbitration provision falls within one of the FAA's express statutory exemptions have failed to undermine appellate jurisdiction over appeals asserting the right to a stay pending arbitration under the contract. *See Palcko*, 372 F.3d at 591–592 (rejecting claim that district court finding that contract fell within 9 U.S.C. § 1's "employment contract" exemption removed Section 16(a)(1) jurisdiction).

In each of these situations, courts recognized that Section 16's text foreclosed arguments parallel

to those made by respondents here: namely, that an alleged defect in an appellant's substantive claim for relief served to remove the claim entirely from the reach of Sections 3 or 4. Although any of these reasons could, if correct, require a court to reject a party's request for relief under Sections 3 or 4, they cannot serve to deny movants the opportunity to obtain immediate appellate review under Section 16(a)(1).

The same textual rule should control here. Regardless of the *merits* of petitioners' Section 3 motion, petitioners have certainly *alleged* that they are entitled to relief under Section 3. By denying the motion, the district court "refus[ed] a stay of an[] action under section 3 of this title." 9 U.S.C. § 16(a)(1)(A). The plain language of Section 16 therefore compels the conclusion that appellate jurisdiction exists over this case.

B. Congress Enacted Section 16 to Allow for Immediate Interlocutory Review of All Orders Hostile to Arbitration.

Petitioners' interpretation of Section 16(a)(1) is confirmed by the structure of the statute, which reflects Congress's clear intent to promote appeals of orders unfavorable to arbitration.

Congress enacted Section 16 in response to this Court's decision in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), which effectively terminated the right to interlocutory review of Section 3 and 4 orders. By enacting

Section 16, Congress "replace[d] the unlamented *Enelow-Ettelson* doctrine . . . with a simpler approach under which anti-arbitration decisions are immediately appealable, while orders enforcing arbitration clauses may be appealed only following the close of the entire case." *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997) (citation omitted). Section 16 provides a bright-line rule that advances the federal policy favoring arbitration by ensuring that *all* orders denying relief under Sections 3 and 4 are immediately appealable, *see* 9 U.S.C. § 16(a)(1), while orders granting relief under Sections 3 and 4 are not. *See id.* at § 16(b). By giving extraordinary interlocutory preference to district court orders adverse to arbitration, Section 16 "reflects a deliberate determination that appeal rules should reflect a strong policy favoring arbitration." 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.17, at 9–10 (2d ed. 1992 & 2008 Supp.).

The Sixth Circuit's interpretation of Section 16(a)(1) thus contradicts the clear congressional purpose behind Section 16. Even though Section 16(a)(1) provides for appellate jurisdiction of *all* orders adverse to arbitration under Sections 3 and 4, the court of appeals adopted a categorical rule barring jurisdiction solely because petitioners were not signatories to the contracts containing the arbitration provision. However, when Congress wanted to set forth such categorical rules barring appeals, it did so clearly and unmistakably. *See* 9 U.S.C. § 16(b)(1)–(4). The Sixth Circuit's decision to

create a new category of proscribed appeals is contrary to both the language and purpose of Section 16.

C. This Court's Decisions Teach That Appellate Jurisdiction Is Distinct from the Merits.

Petitioners' interpretation of Section 16 is further supported by an important principle underlying this Court's jurisprudence: that jurisdiction is judged *independently* from the merits of a case. This rule is well established in the context of federal subject-matter jurisdiction. *See Bell v. Hood*, 327 U.S. 678, 682 (1946) ("[F]ailure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."). Though this Court has yet to apply this principle expressly in the context of Section 16 appeals, this Court's decisions in the analogous context of immunity appeals reinforce the conclusion that appellate jurisdiction under Section 16(a)(1) does not turn on the merits of the claim being appealed.

Under the "collateral order" doctrine, courts of appeals have jurisdiction over appeals taken from otherwise interlocutory district court orders denying claims of absolute immunity from suit, qualified immunity from suit, and Eleventh Amendment immunity from suit. *Will v. Hallock*, 546 U.S. 345, 350 (2006). In accordance with this rule, the Court has regularly recognized appellate jurisdiction over immunity appeals, even when the underlying claim to immunity was found meritless. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (rejecting claim of

absolute immunity on merits, in case where court of appeals dismissed for want of jurisdiction). Thus, once such immunity is claimed and the claim is rejected, the court of appeals has jurisdiction to evaluate the merits of the claim. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (qualified immunity); *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 254–255 (2d Cir. 1984) (holding that even though no court had previously endorsed defendants' theory of immunity, "the mere fact that the merits of defendants' claim to absolute immunity are unsettled does not of itself defeat their right to interlocutory review of that claim at this point").

This Court's decision in *Behrens v. Pelletier*, 516 U.S. 299 (1996), establishes that this principle applies even in the face of a categorical legal rule barring a claim on the merits. In *Behrens*, the Court addressed whether an official could pursue successive pre-trial appeals of the denial of its immunity defense. In light of prior circuit precedent holding that successive appeals were barred, the Ninth Circuit dismissed the appeal for want of jurisdiction. *Behrens*, 516 U.S. at 303. But this Court rejected the Ninth Circuit's jurisdictional analysis, stating that such concerns spoke to the *merits* of the claim rather than to the quite distinct question of *jurisdiction*:

> [T]he question before us here—whether there is jurisdiction over the appeal, as opposed to whether the appeal is frivolous—must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for

> reversing the order. Appeal rights cannot depend upon the facts of a particular case.

Id. at 311 (internal quotation omitted).

Petitioners ask this Court to apply to this case the same rule that it applied in *Behrens*, divorcing the question of appellate jurisdiction from the substantive merits of petitioners' Section 3 motion. Because petitioners sought and were denied a Section 3 stay, Section 16(a)(1)(A) provides jurisdiction over the appeal from the denial of that Section 3 claim, regardless of the Sixth Circuit's view of the merits of that claim.

D. Petitioners' Interpretation of Section 16 Furthers Judicial Efficiency.

In addition to being mandated by the statutory text, consonant with FAA's structure and purpose, and supported by this Court's jurisprudence in the analogous context of immunity appeals, petitioners' interpretation of Section 16 has the additional advantage of establishing a clear and easily administered test for appellate jurisdiction.

This Court's cases value easily administered jurisdictional tests, as they obviate any need for a court of appeals to conduct detailed factual or legal inquiries merely to ascertain whether the court may *consider* the merits of an appeal. *See, e.g., Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) (rejecting multi-factored jurisdictional balancing test). Petitioners' test for appellate jurisdiction under Section 16(a)(1) is consistent

with this principle, as the only requirement under petitioners' test is that the appellant sought and was denied relief under Section 3 or 4. Such a rule eliminates any need for a court of appeals to probe the reasoning or legal arguments supporting an appellant's Section 3 or 4 motion in order to ascertain the existence of appellate jurisdiction. As a result, petitioners' rule ensures that the jurisdictional answer will not vary depending on the underlying facts of any particular appeal.

Furthermore, there should be no concern that meritless appeals will either disrupt district courts or burden the courts of appeals. District courts will remain unhampered, as they may take advantage of the certification process approved by this Court in *Behrens* to retain jurisdiction over a case while a Section 16(a)(1) appeal certified as "frivolous" is pending. *See Behrens*, 516 U.S. at 310–311 (discussing certification process for immunity appeals adopted by several circuits); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1252–1253 (11th Cir. 2004) (outlining certification process for district courts to follow in Section 16 appeals); *Bradford-Scott*, 128 F.3d at 506–507 (directing district courts to apply certification process from immunity appeals to Section 16 appeals). As for the courts of appeals, they can easily and effectively dispose of groundless Section 16 appeals the same way that they can dispose of groundless immunity appeals—by exercising their "supervisory powers . . . to establish summary procedures and calendars to weed out frivolous claims." *Behrens*, 516 U.S. at 310

(citing *Abney v. United States*, 431 U.S. 651, 662 n.8 (1977)).

* * * * *

Section 16(a)(1)(A)'s only requirements are that Section 3 relief be sought and denied—not that the motion seeking such relief also be meritorious. Such an interpretation is supported not only by the statutory text but also by congressional intent, this Court's decisions in an analogous context, and considerations of judicial efficiency. As a result, the fact that petitioners sought and were denied Section 3 relief, standing alone, establishes appellate jurisdiction under Section 16. This Court should therefore reverse the Sixth Circuit's jurisdictional holding.[6]

II. THE SIXTH CIRCUIT'S INTERPRETATION OF SECTION 3 IS ERRONEOUS.

Section 3 of the FAA provides that "on application of one of the parties," a district court shall stay proceedings pending arbitration if the district court concludes that the "issue involved in

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[6] If this Court reverses the Sixth Circuit's jurisdictional determination, this Court should still reach the second question presented, because the Sixth Circuit has interpreted Section 3 to establish a categorical bar to petitioners' claim. Reversal on appellate jurisdiction alone would still leave that erroneous categorical rule in place, depriving petitioners of any relief under Section 3. It would also leave in place the substantial circuit split underlying the second question presented. *See* Pet. 21–26.

such suit or proceeding is referable to arbitration" under "an agreement in writing for such arbitration," so long as the stay applicant is "not in default in proceeding with such arbitration." 9 U.S.C. § 3.

There is no dispute in this case that petitioners sought relief under a "written arbitration agreement"—the arbitration provision in the Bricolage management agreements. Pet. App. 3a–4a; J.A. 80–81, 99–100, 118–119. In order to establish Section 3's "referable to arbitration" requirement, petitioners argued that they were entitled to enforce the arbitration provision against respondents based on a theory of equitable estoppel. The district court rejected petitioners' argument on the merits, finding that petitioners could not establish the requirements of equitable estoppel necessary to give them a right to invoke the arbitration provision, and also that the asserted claims fell outside the scope of the arbitration provision. Pet. App. 15a–16a.

Though petitioners challenged the district court's determinations on appeal, the Sixth Circuit expressly declined to review them. Pet. App. 5a. Instead, the court of appeals held that petitioners were not entitled to relief based on a categorical ruling that Section 3 does not apply, as a matter of law, to claims involving non-signatories. Pet. App. 5a. In doing so, the Sixth Circuit erred.

Under Section 2 of the FAA, the rights and obligations of non-signatories under an arbitration agreement are governed not by Section 3, but by

state law principles of law and equity generally applicable to contracts. Courts and scholarly treatises agree that under such common law principles, non-signatories may enforce and be bound to arbitration agreements. Section 3 is merely a mechanism to enforce such state law rights recognized by Section 2, and neither Section 2 nor Section 3 imposes any signature requirement on arbitration agreements.

A. Under Section 2, State Law Principles of Law and Equity Generally Applicable to Contracts Govern the Rights and Obligations of Non-Signatories to Arbitration Agreements.

Section 2 of the FAA, which is the Act's "centerpiece," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), provides that a "written provision" to arbitrate future controversies arising out of a contract containing the provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Under Section 2, ordinary state law principles of "law and equity" governing "issues concerning the validity, revocability, and enforceability of contracts generally" apply to arbitration agreements governed by the FAA. *Perry v. Thomas*, 482 U.S. 483, 492–493 n.9 (1987) (citing Section 2); *see also* Note, *Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 Yale L.J. 847, 860–861

(1960) ("Thus, issues involving the 'making of the arbitration agreement,' which the federal act declares are issues for the court, would be decided under state rules of 'law and equity.'").

Accordingly, this Court has twice emphasized that under Section 2, state law governs the rights and obligations of non-signatories under a given arbitration provision. First, in *Perry*, non-signatories asserted that they could enforce an arbitration provision to compel arbitration; the plaintiff contended that the non-signatories lacked "standing" to enforce the provision. 482 U.S. at 492. In remanding to the lower court to decide that issue, which this Court characterized as "whether the arbitration provision inures to the benefit of [the non-signatories]," *id.*, this Court observed that Section 2 required the lower court to apply state law principles:

> We note, however, the choice-of-law issue that arises when defenses such as Thomas' so-called "standing" and unconscionability arguments are asserted. In instances such as these, the text of Section 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law* . . . "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2. Thus, state law, whether of legislative or judicial origin, is applicable *if* that law arose

> to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.

Id. at 492–493 n.9 (emphasis in original, citations omitted).

The Court later reiterated this principle in *First Options, Inc. v. Kaplan*, 514 U.S. 938 (1995). In *First Options*, non-signatories contended that that they were not bound to an arbitration provision and sought to vacate an arbitration award against them. This Court, following *Perry*, stated that "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *Id.* at 944.

As in the instant case, both *Perry* and *First Options* involved the rights or obligations of non-signatories to contracts containing arbitration provisions. In both cases, this Court stated that state law determined the rights and obligations of the non-signatories. Thus, under Section 2 and this Court's jurisprudence, state law principles of "law

and equity" applicable to contracts control whether petitioners may satisfy Section 3's "referable to arbitration" requirement by invoking equitable estoppel.

B. State Law Principles of "Law and Equity" Allow Non-Signatories to Enforce and Be Bound to Arbitration Agreements under Myriad Theories, Including Equitable Estoppel.

It is indisputable that common law contract principles, either alone or in conjunction with other doctrines such as agency, permit non-signatories to enforce or be bound to contracts in myriad circumstances: "hundreds of years of common law" recognize that "non-parties" may enforce or be bound by contracts. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.10 (9th Cir. 2006) (Kozinski, J.). In light of this common law history, "[i]t is not surprising then to find a long series of decisions which recognize that the variety of ways in which a [non-signatory] may [enforce or] become bound by a written arbitration provision is limited only by generally operative principles of contract law." *Fisser v. Int'l Bank*, 282 F.2d 231, 233 (2d Cir. 1960).

Under these ordinary state law principles, courts have routinely recognized—in cases decided under the FAA—that non-signatories may enforce or be bound to arbitration agreements under a wide variety of theories, including incorporation by refer-

ence,[7] assumption,[8] agency,[9] alter ego/corporate veil piercing,[10] equitable estoppel,[11] assignment,[12] successor in interest,[13] and third-party beneficiary.[14] Indeed, scholarly treatises devote entire chapters to the various common law legal theories by which non-signatories can enforce or be bound to arbitration agreements. *See, e.g.*, 21 Richard A. Lord, *Williston on Contracts* § 57:19 (4th ed. 2001) ("*Williston*") ("Obligations and Rights of Persons Who Are Not Parties to Arbitration Agreements"); 1 Larry E. Edmonson, *Domke on Commercial Arbitration* Ch. 13 (3d ed. 2008) ("*Domke*") ("Effect of Arbitration Agreement on Nonsignatories"); 1 Thomas Oehmke, *Oehmke Commercial Arbitration* Ch. 11 (3d ed. 2008) ("*Oehmke*") ("Nonsignatories and Third Parties"). All of these authorities recognize that equitable

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[7] *Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co.*, 351 F.2d 503, 506 (2d Cir. 1965) (non-signatory can enforce).

[8] *Employers Ins. v. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1323 (11th Cir. 2001) (non-signatory bound).

[9] *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993) (non-signatory can enforce).

[10] *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320 (4th Cir. 1988) (non-signatory can enforce).

[11] *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 758 (11th Cir. 1993) (non-signatory can enforce).

[12] *Chatham Shipping Co. v. Fertex S.S. Corp.*, 352 F.2d 291, 294 (2d Cir. 1965) (non-signatory can enforce).

[13] *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 393 (8th Cir. 1994) (non-signatory bound).

[14] *JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596, 600 (5th Cir. 2007) (non-signatory bound).

estoppel is among the many theories under which a non-signatory may enforce an arbitration agreement. *See, e.g.*, *Williston* § 57:19, at 189; 1 *Domke* § 13:8, at 13-19; 1 *Oehmke* § 11:1, at 11-2. Thus, courts and commentators alike agree that "hundreds of years of common law" allow non-signatories to enforce or be bound to arbitration agreements under the FAA. None of this doctrine can survive, however, if this Court affirms the Sixth Circuit's decision.

By exempting arbitration agreements from ordinary common law principles that otherwise allow non-signatories to enforce or be bound to contracts, the Sixth Circuit rule actually conflicts with Section 2's anti-discrimination principle *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) ("By enacting § 2, we have said several times, Congress precluded states from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" (citation omitted)). To maintain consistency with Section 2, Section 3 must be interpreted to provide relief to non-signatories entitled to enforce the arbitration provision under ordinary principles of "law and equity." Otherwise, arbitration provisions will be *less* enforceable than ordinary commercial contracts—the very result Section 2 was designed to prevent.

C. Nothing in Section 3 Bars Non-Signatories from Enforcing Arbitration Rights Recognized under State Law.

As established above, Section 2 is the "centerpiece" provision of the FAA, under which state law generally applicable to contracts is made to govern arbitration provisions. *See also Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 is the primary substantive provision of the Act."). Section 3 and its companion, Section 4, impose no substantive requirements, but instead are mere devices to enforce state law arbitration rights recognized and protected by Section 2. *See Anaconda v. Am. Sugar Ref. Co.*, 322 U.S. 42, 44 (1944) (Sections 3 and 4 "implement[]" the "declared policy" of Section 2); *Moses H. Cone Mem. Hosp.*, 460 U.S. at 22 (Sections 3 and 4 of the FAA are "parallel devices for enforcing an arbitration agreement"); Ian R. MacNeil, *American Arbitration Law* 102 (1992) ("*American Arbitration Law*") ("Sections 3 and 4 are the key sections implementing the enforceability principle [of Section 2]."); *see also Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 201 (1956) (rejecting argument that Section 3 can be read independently of Section 2).

Under this regime, state law principles of "law and equity" control a party's enforcement rights—not Section 3. The Sixth Circuit thus erred by interpreting Section 3 to impose a substantive requirement that the moving party have signed the contract containing the arbitration provision. Such a

requirement contradicts Section 3's text, history, and policy.

1. Though Section 3 plainly requires a "written agreement" to arbitrate, neither it nor Section 2 imposes a signature requirement. Once again, Section 3 cannot be understood without reference to Section 2. *See Bernhardt*, 350 U.S. at 201 ("[T]he 'agreement in writing' for arbitration referred to in § 3 is the kind of agreement which §§ 1 and 2 have brought under federal regulation.").

All that Section 2 requires is a "written provision" to arbitrate, which need not be signed. As the Second Circuit explained almost fifty years ago:

> It is true that under the Act, a "written provision" . . . is the *sine qua non* of an enforceable arbitration agreement. 9 U.S.C. §§ 2, 4. It does not follow, however, that under the Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. For the Act contains no built-in Statute of Frauds provision but merely requires that the arbitration provision itself be in writing. Ordinary contract principles determine who is bound by such written provisions and of course parties can become contractually bound absent their signatures.

Fisser, 282 F.2d at 233 (footnotes omitted); *see also* 1 Ian R. MacNeil et al., *Federal Arbitration Law: Agreements, Awards and Remedies under the Federal Arbitration Act* § 8.3.1, at 8:5 (1999)

("*Federal Arbitration Law*") ("There must be an arbitration agreement and it must be in writing, but need not be signed."); 1 *Domke* § 9:1, at 9-2 ("The 'in writing' requirement has a further ramification, namely that the arbitration clause itself does not have to be signed."); 1 *Oehmke* § 5:3, at 5-5 (same); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987) ("As to the unsigned forms, it is well established that a party may be bound by an agreement to arbitrate even absent a signature. Further, while the Act requires a writing, it does not require that the writing be signed by the parties. *See* 9 U.S.C. § 3." (citations omitted)).

Thus, the signature requirement adopted by the Sixth Circuit is unsupported by the FAA's text. Nothing in Section 3's writing requirement renders Section 3 relief unavailable to non-signatories, if the claims against the non-signatories are "referable to arbitration" through the arbitration provision under applicable principles of state law.

2. Petitioners' textual interpretation of Section 3 is confirmed by the historical origins of the FAA. Because the FAA was largely based on the New York Arbitration Act of 1920, 1920 N.Y. Laws, ch. 275 ("1920 New York Act"), *see Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 n.7 (2008), "any starting point of historical analysis must, therefore, be the New York act." *American Arbitration Law* at 106.

Under the 1920 New York Act, agreements to arbitrate *future* controversies were made enforceable so long as they were in writing, but this writing

could be informal and did not need be signed by the parties. *Id.* at 35; *see also, e.g., Japan Cotton Trading Co. v. Farber*, 253 N.Y.S. 290, 292–293 (App. Div. 1931) ("The Arbitration Law in words at least, does not require the signature of a party to an agreement to arbitrate. It merely requires a written contract to do so."). The 1920 New York Act's requirement accords with petitioners' rule, allowing for enforcement of an arbitration provision whenever the moving party possessed rights derived therefrom.

By contrast, under an older provision of the New York Code of Civil Procedure that was left intact by the 1920 New York Act, N.Y. Civil Practice Act § 1449, agreements to arbitrate *existing* controversies were enforceable only if the parties complied with strict formalities associated with the recordation of a deed, including signatures and acknowledgements. *See* Osmond K. Fraenkel, *The New York Arbitration Law*, 32 Colum. L. Rev. 623, 625 (1932). The Civil Practice Act thus included a signature requirement similar to that adopted by the Sixth Circuit below, excluding non-signatories from asserting arbitration rights.

Against this backdrop of New York law, Congress enacted the FAA, adopting a version of the informal writing requirement of the 1920 New York Act rather than the stricter formalities of the Civil Practice Act. *See Fisser*, 282 F.2d at 233 n.4 (contrasting the informal requirements of the FAA and the 1920 New York Act with the formalities of N.Y. Civil Practice Act § 1449). As a result, Congress implicitly rejected the very requirement that the court below relied upon in rejecting petitioners'

claims. The FAA's history thus confirms what the statutory text makes clear: although the FAA requires a written arbitration agreement, the agreement need not be signed to be enforceable.

3. Finally, practical experience teaches that the Sixth Circuit's erroneous categorical rule, if adopted by this Court, would render routine commercial practices impossible. Professor MacNeil and his co-authors explain the problems a signature requirement would create:

> The requirement of writing, but not signature, reflects an understanding of the informal nature of many commercial negotiations, and a concern about the dampening effect upon arbitration from excessive formalities. For example, it has been asserted that a statutory requirement that written arbitration clauses be signed would have the effect either of eliminating as a practical matter arbitration provisions from numerous contracts which are entered into daily or of upsetting routine and ordinary business practices whereby contracts are made by accepting purchase orders, by broker's notes, by performance, or even silent assent.

2 *Federal Arbitration Law* § 17.7.3, at 17:92 (internal quotation marks omitted); *see also* 1 *Domke* 9:1, at 9-2 (the absence of a signature requirement under the FAA "conforms to the widespread practice in many fields of trade and commerce"); 1 *Oehmke* § 5:3, at 5-5 (same). Therefore, the Sixth Circuit's rule is

impossible to reconcile with the ordinary commercial practices that the FAA is designed to facilitate.

* * * * *

At bottom, Section 3 is merely a mechanism for enforcing state law rights that apply by operation of the FAA's centerpiece provision, Section 2. Under Section 2, state law principles of "law and equity" generally applicable to contracts apply to arbitration provisions, so long as such principles do not single out arbitration provisions for adverse treatment. These general principles, not Section 3, determine whether petitioners may enforce the arbitration provision under equitable estoppel. If petitioners can otherwise enforce the arbitration provision under equitable estoppel, and if respondents' claims fall within the scope of the arbitration provision, then the district court erred by not granting petitioners' Section 3 motion. The Sixth Circuit in turn erred by adopting an unwarranted categorical exception to Section 3 based on petitioners' status as non-signatories, rather than considering petitioners' arguments that respondents' claims are "referable to arbitration" based on the doctrine of equitable estoppel.

CONCLUSION

This Court should reverse the court of appeals, both as to appellate jurisdiction under Section 16(a)(1)(A) and the merits of Section 3, and remand with instructions to consider petitioners' arguments that equitable estoppel allows them to enforce the arbitration provision.

Dated: December 2008

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RESPONDENT'S BRIEF

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In The
Supreme Court of the United States

ARTHUR ANDERSEN, LLP, ET AL.,
Petitioners,

v.

WAYNE CARLISLE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

The defendants, who were not parties to the arbitration agreement, unsuccessfully invoked equitable estoppel in seeking to stay the claims brought against them by the plaintiffs, who were parties to that agreement. The district court denied the stay and the defendants filed an interlocutory appeal, purportedly under 9 U.S.C. § 16(a)(1)(A). Did the stay requested and denied fall outside 9 U.S.C. § 3, such that the district court's denial was not immediately appealable under Section 16(a)(1)(A) of the Federal Arbitration Act?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no respondents are subsidiaries of a publicly-owned corporation, and no publicly-owned corporation has a financial interest in the outcome of these proceedings.

TABLE OF CONTENTS

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PRELIMINARY STATEMENT 1

STATEMENT 2

A. The Relevant Facts 2

B. The Proceedings in the District Court 6

C. Petitioners' Attempted Interlocutory Appeal to the Sixth Circuit 9

1. The *DSMC* decision 10

2. The *Universal* decision 12

3. Petitioners' response in the Sixth Circuit 13

4. The motion panel ruling in *Ross* 14

5. The Sixth Circuit opinion 16

SUMMARY OF ARGUMENT 16

ARGUMENT 19

I. THE REQUESTED STAY FELL OUTSIDE SECTION 3 OF THE FEDERAL ARBITRATION ACT AND, THEREFORE, THE DISTRICT COURT'S REFUSAL TO GRANT IT IS NOT IMMEDIATELY APPEALABLE UNDER SECTION 16(a)(1)(A) OF THE ACT. 19

A. Language In Sections 3 And 16(a)(1)(A) Of The FAA Precludes Automatic Interlocutory Appellate Jurisdiction Over An Order Denying A Motion For A Stay Pending Arbitration That Was Predicated On The Non-Signatory Applicant's Assertion Of Equitable Estoppel. 24

1. The language of section 3 and section 16(a)(1)(A) 24

2. Section 3's other textual features 28

3. Petitioners' "label" test 31

B. The Policy Underlying The FAA, Which Favors Consensual Arbitration, Does Not Justify Recognition Of An Automatic Right To An Interlocutory Appeal For A Non-Party To An Arbitration Agreement Who Unsuccessfully Sought To Stay A Signatory's Action Based On Equitable Estoppel. 36

C. In Coming To The Conclusion It Had No Jurisdiction Over Petitioners' Interlocutory Appeal, The Sixth Circuit Did Not Delve Into The Merits Of The Appeal. 41

D. To The Extent Petitioners' Status As Strangers To The Arbitration Agreement Invoking Equitable Estoppel Deprives Them Of Opportunities For Mandatory Section 3 Stays, Section 4 Orders Compelling Arbitration, And Automatic Interlocutory Appeals Under Sections 16(a)(1)(A) And 16(a)(1)(B), That Status Is A Consequence Of Their Own Choice Not To Enter Into Arbitration Agreements With Respondents. 46

CONCLUSION 51

TABLE OF AUTHORITIES

CASES

Abney v. United States,
431 U.S. 651 (1977) 22, 33

Ardestani v. INS,
502 U.S. 129 (1991) 24

AT&T Tech., Inc. v. Communications Workers of America,
475 U.S. 643 (1986) 38

Baltimore Contractors v. Bodinger,
348 U.S. 176 (1955) 22, 23, 50

Brown v. Pacific Life Ins. Co.,
462 F.3d 384 (5th Cir. 2006) 25, 42

Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle,
521 F.3d 597 (6th Cir. 2007) ..... *passim*

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 23

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985) 36, 37, 38

DeSantana v. Velez,
956 F.2d 16 (1st Cir. 1992) 45

DSMC Inc. v. Convera Corp.,
349 F.3d 679 (D.C. Cir. 2003) ..... *passim*

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 37

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 19, 37, 41

Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1988) 23, 50

Grubart v. Great Lakes Dredge & Dock,
513 U.S. 527 (1995) 23

Hall Street Assoc., L.L.C. v. Mattel, Inc.,
128 S.Ct. 1396 (2008) 28, 37

Harrison v. Ash,
539 F.3d 510 (6th Cir. 2008) 45

Hughes Masonry Co., Inc. v. Greater Clark County School Bldg. Corp.,
659 F.2d 836 (7th Cir. 1981) 50

IDS Life Ins. Co. v. Sunamerica, Inc.,
103 F.3d 524 (7th Cir. 1996) 25, 26, 31, 49

In re Universal Service Fund Tel. Billing Practice Litig.,
428 F.3d 940 (10th Cir. 2005) ..... *passim*

Johnson v. Jones,
515 U.S. 304 (1995) 22

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 38

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 38, 40

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 31

Newsom v. Xenia City School Dist. Bd. of Educ.,
No. C-3-95-173, 1996 WL 1089865 (S.D. Ohio Mar. 25, 1996) 27

Penman v. Korper, No. 91-15520,
1992 WL 276462 (9th Cir. Oct. 8, 1992) 45

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983) 23

Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.,
113 S.W.3d 636 (Ky. App. 2003) 27

Ross v. American Express Co.,
478 F.3d 96 (2d Cir. 2007) ..... *passim*

Ross v. American Express Co.,
547 F.3d 137 (2d Cir. 2008) 15

Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.,
526 F.3d 38 (1st Cir. 2008) 15

Stichting Mayflower Recreational v. City of Park City,
225 Fed.Appx. 744 (10th Cir. 2007) 45

Toledano v. O'Connor,
501 F.Supp.2d 127 (D.D.C. 2007) 31

Ufe Inc. v. Methode Elec., Inc.,
808 F.Supp. 1407 (D. Minn. 1992) 27

United States v. Sisson,
399 U.S. 267 (1970) 32

Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,
489 U.S. 468 (1989) 30

Westmoreland v. Sadoux,
299 F.3d 462 (5th Cir. 2002) 38, 39, 40, 48

Workman v. Bredesen,
486 F.3d 896 (6th Cir. 2007) 32, 33

STATUTES

9 U.S.C. § 3 ..... *passim*

9 U.S.C. § 16(a)(1)(A) ..... *passim*

9 U.S.C. § 16(a)(1)(B) 11, 19, 46, 48

9 U.S.C. § 16(b)(1) 42, 48

28 U.S.C. § 1292(b) 19, 23, 31, 48

28 U.S.C. § 1292(e) 22, 23

RULES

Sup. Ct. R. 29.6 ii

OTHER AUTHORITIES

1 *Domke on Commercial Arbitration* § 13:1 38

J.P. Stevens, "The Shakespeare Canon of Statutory Construction," 140 U. Pa. L. Rev. 1373 (April 1992) 20

H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924) . . 36

Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," *Benchmarks* (1967) 20

Richard A. Lord, 3 *Williston on Contracts* § 7:11 . 27

Richard A. Lord, 4 *Williston on Contracts* § 8:5 . . 27

PRELIMINARY STATEMENT

This matter arises out of the dismissal of petitioners' interlocutory appeal based on a lack of jurisdiction under 9 U.S.C. § 16(a)(1)(A). The court of appeals dismissed the appeal because petitioners, as non-parties to an arbitration agreement who unsuccessfully asserted equitable estoppel in attempting to force one of the agreement's parties to arbitrate with them, could not satisfy the "agreement in writing" requirement of 9 U.S.C. § 3, which provides for mandatory stays pending arbitration. Because the stay petitioners requested fell outside section 3, they were not entitled to file an interlocutory appeal from its denial, under 9 U.S.C. § 16(a)(1)(A).

Petitioners' Brief peddles the legal fiction that a non-party to an arbitration agreement, who unsuccessfully asserts equitable estoppel in attempting to compel one of the agreement's parties to arbitrate, nonetheless satisfies the "agreement in writing" requirement of section 3 and, thus, automatically is entitled to file an interlocutory appeal from a stay denial, under section 16(a)(1)(A). This case highlights why the Court should extinguish this fiction once and for all: A major law firm, which had no arbitration clauses in its clients' retention agreements, is sued for legal malpractice for giving them bad tax advice, among other theories. It responds by trying to force its clients to arbitrate their claims against it. Another defendant in the case, a brokerage firm with whom the clients actually had agreed to arbitrate their account-related claims, files for bankruptcy. That arbitration – the only one to which these clients agreed – will never take place.

Almost a decade after signing retention agreements that never mentioned arbitration, the clients' claims against their former lawyers remain captive to the lawyers' demand that they arbitrate. That demand, which failed to yield a district court stay the former lawyers sought, now has turned into a protracted dispute over whether the court of appeals has the authority to hear an immediate appeal from the stay denial. So even though nary a word ever passed between client and lawyer about where any claims between them would be litigated (*i.e.*, court or arbitration), the clients and their former lawyers (as well as their former accountants) remain locked in time-consuming litigation over when to litigate an appeal about whether to litigate or stay claims based on malpractice that occurred nine years ago. Neither the language of sections 3 and 16(a)(1)(A) of the Federal Arbitration Act ("FAA"), nor the federal policy favoring arbitration, supports granting petitioners the right to an automatic interlocutory appeal.

STATEMENT

A. The Relevant Facts

In June 1999, Wayne Carlisle, James Bushman, and Gary Strassel (respondents) sold their heavy construction equipment business in Kentucky. App. 20. After the sale, they began exploring methods of legally minimizing taxes on gains realized from it. App. 20-21. They consulted with Arthur Andersen LLP ("Andersen"), which had served as their company's accountant, auditor, and tax advisor for more than twenty years. App. 20-21. In September 1999, Andersen introduced them to Bricolage Capital, LLC ("Bricolage"), which at the time described itself as "a

financial boutique that developed complex structured transactions for high net worth individuals and private corporations." App. 21. Bricolage in turn referred them to Curtis, Mallet-Prevost, Colt & Mosle, LLP ("Curtis"), a New York law firm that held itself out as providing "independent" tax advice. App. 58.

Andersen, Bricolage, and Curtis recommended a tax shelter based on foreign currency exchange options, specifically a "leveraged option strategy" ("LOS"). App. 21. Through a series of transactions involving partnership interests, the LOS was designed to generate tax losses to offset income from other transactions. Curtis agreed to provide an independent, reliable legal opinion substantiating the legality and validity of the LOS as a viable tax shelter. App. 23-24.

In October 1999, Carlisle, Bushman, and Strassel entered into standard Investment Management Agreements ("IMAs") with Bricolage, through their respective LLCs – WC Thomas, JB Cinoh, and GS Noky. App. 60, 67-123. The IMAs between Bricolage (defined as "the Manager") and the LLCs (defined individually in each IMA as "the Client") provided Bricolage with "full discretionary" authority to manage the assets in the accounts, App. 67-68, 86-87 & 105-106, and contained the following other provisions:

- "[T]he Client desires to retain the services of the Manager to provide investment management services in respect of all cash, securities and other assets and contracts comprising the investment account ('Account')" established by each Client. App. 67, 86, 105.

- "[T]he Client is a sophisticated investor experienced in business and investment matters and receives tax, legal and accounting advice with respect to the Client's investments generally and in respect of the Account from persons other than the Manager." App. 68, 87 & 106.

- "Neither the Manager nor any of its officers, directors, employees or agents shall be liable for any loss, expense, cost or liability arising out of any error in judgment or any action or omission hereunder, including any instruction given to the [bank acting as] Custodian by anyone other than an officer, director, employee or agent of the Manager, unless arising out of their negligence, malfeasance or bad faith." App. 71-72, 90-91 & 109-110.

- "Any controversy arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration conducted in New York, New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association." App. 80-81, 99-100 & 118-119.

The IMAs did not mention the LOS, nor impose responsibilities on any person or entity other than Bricolage and its principals.

Late in 1999, Carlisle, Bushman, and Strassel engaged in the recommended LOS transactions

through their separate business entities. App. 25.[1] And they were required to invest $4,350,000 in certain warrants to purchase stock in unidentified small, high-tech companies. App. 22-23. After these transactions were completed, they formed WJG Strategic Investments and funded it with $4,350,000. App. 26. These funds were used to purchase from Prism Connectivity Ventures ("Prism") warrants that previously had been owned by Integrated Capital Associates, Inc. ("ICA"), an investment banking firm with the same principals as another firm, Intercontinental Pacific Group, Inc. ("IPG"), and that turned out to be virtually worthless. App. 19-20, 26-27.

Shortly after paying Prism for the warrants, Carlisle, Bushman, and Strassel signed individual retainer agreements with Curtis which billed each of them $100,000 as a retainer for professional services to be rendered. App. 24. These retainer agreements did not contain an arbitration clause.[2] Curtis subsequently instructed respondents to pay $100,000 each to IPG, ostensibly to reimburse ICA for its payment of their retainers. App. 25. Unbeknownst to respondents, Curtis not only represented ICA and IPG at the time, but ICA was then paying Curtis for tax shelter-related services to be performed for at least five other ICA-related clients. App. 25.

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[1] Carlisle did so through WC Thomas, LLC, WC Venture Corp., and the Ohio 1999 Irrevocable ESBT, a trust; Bushman, through JB Cinoh, LLC, JEB Venture Corp., and the JEB Revocable ESBT, a trust; Strassel, through GS Noky, LLC.

[2] Respondents had not signed any retention agreements with Andersen during the 20 years it had served as their accountant, auditor, and tax advisor.

In June 2000, Curtis sent Carlisle, Bushman, and Strassel individual letters purportedly containing the firm's independent opinion validating the LOS as a tax shelter. App. 27. In reliance on these letters and the tax advice provided by Andersen, respondents filed their 1999 income tax returns, on which they claimed capital and ordinary losses from their LOS transactions. App. 30-31. Unbeknownst to respondents, these were canned, deceptive, prefabricated form letters, prepared well in advance of Curtis's introduction to respondents and disseminated cookie-cutter style. App. 28.

In August 2000, the IRS deemed the LOS an abusive tax shelter. App. 29-30. Despite receiving notice of the IRS's determination regarding the LOS and its amnesty offer, Curtis failed to retract, modify, or qualify what it knew or should have known was flawed tax advice. *Id.* Respondents were forced to enroll in an IRS settlement program under which all of their outstanding issues with the IRS were resolved, resulting in tens of millions of dollars in damages. App. 31-32. Respondents also resolved their outstanding issues with state tax authorities. App. 31-32.

B. The Proceedings in the District Court

On March 25, 2005, Carlisle, Bushman, and Strassel and their various business entities – including the three LLCs that were parties to the Bricolage IMAs – filed suit in the United States District Court for the Eastern District of Kentucky. App. 11-51. The complaint named nine defendants, including Andersen, Curtis and one of its partners, William Bricker, Jr. ("Bricker"), Bricolage and two of its

principals, and ICA, IPG, and Prism, which were involved in the sale of the virtually worthless warrants. The complaint alleges claims for fraud against all defendants; civil conspiracy against all defendants; legal malpractice against Curtis; professional malpractice against Andersen; breach of fiduciary duty against Andersen, Curtis and its partner Bricker, and Bricolage and its two principals; and negligence against Andersen, Curtis, and Bricolage.

Bricolage was the only defendant that actually was a party to the IMAs containing the arbitration clause at issue. As noted, these IMAs imposed on Bricolage certain responsibilities in managing the investment accounts established by the three LLCs. The pending claims against Curtis and Andersen have nothing to do with whether Bricolage properly managed these accounts. There is no allegation that Bricolage improperly executed any foreign exchange currency option transactions, let alone that Curtis and Andersen are liable for such a lapse. The complaint seeks to hold Curtis and Andersen liable for violating duties that arose by operation of law, separate and apart from any obligations imposed by the IMAs.

It alleges Curtis committed fraud, legal malpractice, and negligence and breached its fiduciary duties to respondents by violating legal obligations the law imposes on lawyers, *i.e.*, misrepresenting themselves as independent counsel, disseminating deceptive opinion letters, failing to apprise respondents that the IRS actually considered the LOS an abusive tax shelter, and accepting payments from third-parties in exchange for compromising their clients' (*i.e.*, respondents') interests. Curtis's alleged

legal duties and violations thereof – and thus the claims on which they are based – have nothing to do with any obligations that a standard IMA between a customer and an investment account manager imposes on the latter.

The complaint alleges Andersen committed fraud, professional malpractice, and negligence and breached its fiduciary duties to respondents by violating legal obligations the law imposes on accountants, auditors, and tax advisors, *i.e.*, deceptively steering respondents to a flawed tax shelter, compromising respondents' interests by instructing them to buy virtually worthless warrants, and failing to apprise respondents that the IRS considered the LOS an abusive tax shelter. Andersen's alleged legal duties and violations thereof – and thus the claims on which they are based – also have nothing to do with the obligations that a standard IMA between a customer and an investment account manager imposes on the latter.

The other defendants, ICA, IPG, and Prism, allegedly violated still other obligations imposed by operation of law, as opposed to the obligations the IMAs imposed on Bricolage. These obligations spring from the selling of worthless warrants to respondents for $4.35 million. There is no allegation these warrants had anything to do with the Bricolage investment accounts governed by the IMAs.

On June 10, 2005, before any appreciable discovery, Andersen filed – and Curtis and Bricker joined in – a motion "to stay these proceedings . . . pending the completion of all necessary and related arbitration proceedings," arguing that equitable estoppel prevents respondents from avoiding arbitration of all claims

against the non-signatory defendants.[3] App. 52-56. The motion argued that, even if the court would not allow them, as non-signatories, to invoke the arbitration clause under equitable estoppel principles, it still should stay the claims against them, pending the arbitration they then anticipated between respondents and Bricolage, the lone signatory defendant. The district court rejected both arguments.

On October 14, 2005, Bricolage filed a bankruptcy petition under Chapter 11. App. 5. Prior to filing its bankruptcy petition, Bricolage had moved to compel respondents to arbitrate their claims against it and its two principals. Due to its bankruptcy filing, however, Bricolage ceased taking part in district court proceedings, and the court denied Bricolage's motion as moot.

C. Petitioners' Attempted Interlocutory Appeal to the Sixth Circuit

The non-signatory defendants filed an interlocutory appeal to the United States Court of Appeals for the Sixth Circuit. Relying on *DSMC Inc. v. Convera Corp.*,

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[3] Although the remaining defendants, ICA, IPG, and Prism, purported to join in the stay motions filed by Bricolage, Andersen, and Curtis, their notices of joinder indicate that they sought to stay the action pending plaintiffs' arbitrations with Andersen, Curtis, and Bricolage. (App. 63, 65). They did not claim respondents would be required to arbitrate with them. This suggests they sought a discretionary stay until after plaintiffs' arbitrations with Andersen, Curtis, and Bricolage. Although ICA, IPG, and Prism joined in the interlocutory appeal to the Sixth Circuit and in the Petition for a Writ of Certiorari, respondents note the apparent distinction between their stay requests and those of Andersen and Curtis.

349 F.3d 679, 683-85 (D.C. Cir. 2003) ("*DSMC*"), and *In re Universal Service Fund Telephone Billing Practice Litig.*, 428 F.3d 940, 942-45 (10th Cir. 2005) ("*Universal*"), plaintiffs (respondents herein) argued the Sixth Circuit had no jurisdiction to entertain petitioners' interlocutory appeal under section 16(a)(1)(A) of the FAA, which permits immediate appeals from orders refusing stays "under section 3" of the FAA.

DSMC and *Universal* contain the same straightforward textual interpretations of section 16(a)(1) and sections 3 and 4 of the FAA. Because section 16(a)(1) limits the interlocutory jurisdiction it confers to appeals from orders refusing section 3 stays or denying section 4 petitions to compel arbitration, both *DSMC* and *Universal* focused on what makes a stay motion a section 3 application and on what makes a motion to compel arbitration a section 4 petition. Both concluded the common denominator was a written arbitration agreement between the party seeking arbitration and the party resisting it. Thus, both *DSMC* and *Universal* limit interlocutory appellate jurisdiction to those cases where the movant could invoke a written agreement compelling arbitration, which non-signatories who unsuccessfully asserted equitable estoppel by definition could not do – precisely the reason they resorted to equitable estoppel in the first place.

1. The *DSMC* decision

In *DSMC*, the United States Court of Appeals for the District of Columbia Circuit (Roberts, J.) discussed at length why sections 3 and 4 – and thus also section 16(a)(1) – cannot apply to a non-signatory's attempt to

compel a signatory to arbitrate based on equitable estoppel:

> Section 4 does not merely require that there be a written agreement somewhere in the picture. It requires that the motion to compel be based on an alleged failure to arbitrate under that written agreement. Convera's motion to compel is not based on any alleged failure by DSMC to arbitrate under the only written agreement at issue here – the one between DSMC and NGTL. The motion is instead based on an effort to expand DSMC's obligation *beyond* the terms of that written agreement pursuant to principles of equitable estoppel.

DSMC, 349 F.3d at 683 (emphasis original). Noting the circuit decisions addressing equitable estoppel in the arbitration context, the court observed:

> Those cases typically did not address jurisdiction under section 16 of the FAA, but instead simply proceeded directly to consider the propriety of compelling signatories to arbitrate with non-signatories. We need not and do not decide whether such an effort can ever succeed. What we do decide is that an effort to compel arbitration in such circumstances on the basis of equitable estoppel does not fall within Section 4 of the FAA. Accordingly, we hold that this court has no jurisdiction under Section 16(a)(1)(B) to hear an appeal of an order denying a motion to compel arbitration between parties *not* under a written agreement to arbitrate. In doing so we are mindful that "section 16 is a limited grant of jurisdiction,"

> that "[i]n general, statutes authorizing appeals should be narrowly construed," and that this is particularly true with respect to statutes allowing interlocutory appeals. . . . We are also cognizant that jurisdictional rules should be, to the extent possible, clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset. . . . Asking whether the parties are signatories to a written agreement to arbitrate satisfies these criteria. On the other hand, the application of equitable estoppel – if permitted in this context – requires a multifactor factual and legal inquiry to determine whether the issues to be litigated by the non-signatory and signatory are sufficiently intertwined with the issues subject to arbitration. That type of analysis, in turn, would require this court to delve deeply into the merits of a case before even deciding whether we had interlocutory appellate jurisdiction – an unattractive prospect.

Id. at 683-84 (citations omitted; emphasis original). The court in *DSMC* also held that section 3 does not apply when a non-signatory to an arbitration clause invokes equitable estoppel in an effort to stay a signatory's suit pending arbitration. *Id.* at 684-85.

2. The *Universal* decision

The Tenth Circuit's decision in *Universal* reached the same conclusion on the issue of interlocutory appellate jurisdiction. Quoting extensively from *DSMC*, the Tenth Circuit observed that circuit decisions that merely addressed equitable estoppel

without first considering the issue of interlocutory appellate jurisdiction "miss the point," adding:

> The issue in this appeal is not whether they have a right to compel arbitration, but whether they have a right to an interlocutory appeal from the denial of a motion seeking to compel arbitration. Given that statutes allowing interlocutory appeals should be narrowly construed, Defendants stand the scope of appellate jurisdiction on its head. . . . We also agree with the *DSMC* court that dismissing this appeal does not mean equitable estoppel cannot be employed to compel arbitration. Indeed, our holding is limited to whether Defendants can invoke interlocutory appellate jurisdiction to challenge the merits of the district court's order. In the absence of jurisdiction, any thoughts we might express on whether the doctrine of equitable estoppel can or should be recognized in the circumstances of this case would be without effect.

Universal, 428 F.3d at 945.

3. Petitioners' response in the Sixth Circuit

Curtis and Andersen responded by dismissing *DSMC* and *Universal* as "extra-jurisdictional cases" that consisted of dicta and did not involve motions expressly brought under section 3 or section 4 of the FAA – facts that, according to them, "render *DSMC* and *Universal* neither controlling nor persuasive." Appellants' [Petitioners'] Reply Brief in 6th Cir. Case No. 06-5290, pp. 8-10. Instead, they argued "Section 16 neither suggests nor requires that an appellate court

inquire beyond the substance of the movants' pleadings or the district court's ruling, as long as the bases for the motion and ruling clearly arose under Section 3. If they did, the Court's jurisdictional inquiry is at an end." *Id.* at 3.[4] They further argued that, "even if this Court chooses to follow the *dicta* of *DSMC* and *Universal*," the court of appeals still would have jurisdiction under section 16(a)(1)(A) because their "express reliance on section 3 was proper . . . ." *Id.* at 11. To this, Curtis and Andersen added that "the ability of a party to move under section 3 is necessarily limited by the statute's requirement that a plaintiff's lawsuit be based 'upon any issue referable to arbitration under an agreement in writing for such arbitration.' 9 U.S.C. § 3." *Id.* at 12.

4. The motion panel ruling in *Ross*

After filing their Reply Brief, Curtis and Andersen brought to the Sixth Circuit's attention a ruling by a Second Circuit motion panel, *Ross v. American Express Co.*, 478 F.3d 96 (2d Cir. 2007). The ruling in *Ross* declined to follow *DSMC* and *Universal*. *Id.* at 100 n. 2. Instead, the court held "the writing requirement of the FAA" was satisfied because the district court had found the non-signatories were "entitled to the benefit of a written agreement" pursuant to equitable

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[4] Curtis and Andersen acknowledged in their Reply Brief below (at p. 8) that, if a defendant's arbitration-related stay request is made not under section 3 but rather pursuant to the district court's general discretionary authority, the defendant would have no right to an automatic interlocutory appeal under section 16.

estoppel. *Id.* at 99.[5] The court reasoned that, where equitable estoppel applies, the

> written agreement alone creates, defines, and provides procedures – including the method for selecting the arbitrators – for implementing the arbitration obligation. . . . In every relevant sense, therefore, appellants are appealing from the refusal to compel arbitration under a written arbitration agreement.

Id. The court observed that a contrary ruling would leave district courts without authority to employ equitable estoppel to stay proceedings or compel arbitration under sections 3 and 4 of the FAA, and could result in "partial or full bifurcation of cases involving a single writing." *Id.*[6]

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[5] The district court in *Ross* had denied the non-signatory defendants' motion to stay and their motion to compel arbitration, despite concluding that they could invoke equitable estoppel against the signatory plaintiffs. It reasoned a jury trial was necessary to determine the validity of the arbitration clauses prior to enforcement because the plaintiffs had raised an antitrust claim concerning the validity of the arbitration clauses. *Ross*, 478 F.3d at 98.

[6] After the Sixth Circuit's decision, but before this Court granted certiorari, the merits panel in *Ross* issued its opinion. It did not revisit the motion panel's jurisdictional ruling, noting only that the Sixth Circuit since had "rejected our analysis" and that "a substantial split among the Circuits has now developed over this jurisdictional question." *Ross v. American Express Co.*, 547 F.3d 137, 141 n. 2 (2d Cir. 2008) (also citing *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 44 n. 6 (1st Cir. 2008)).

5. The Sixth Circuit opinion

Finding "the statutory analysis in *DSMC Inc.* and *Universal Service Fund* superior to the circular reasoning employed by the Second Circuit in *Ross*," the Sixth Circuit held that section 3 is inapplicable because the stay applicants were not parties to a written arbitration agreement and that, therefore, "we are without jurisdiction to hear this appeal on an interlocutory basis" under section 16(a)(1)(A).[7] *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle*, 521 F.3d 597, 598 (6th Cir. 2007).

SUMMARY OF ARGUMENT

The issue in this appeal is whether petitioners, as non-parties to the arbitration agreement who unsuccessfully invoked equitable estoppel in attempting to force respondents to arbitrate with them, have an automatic right to an interlocutory appeal from the district court's refusal to stay

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[7] *DSMC*, *Universal*, and the Sixth Circuit decision refused to give any weight to other circuits' opinions that disposed of interlocutory appeals on their merits without addressing the jurisdictional issue under discussion here. *See DSMC*, 349 F.3d at 683 (quoted above); *Universal*, 428 F.3d at 944 ("Defendants maintain '[c]ourts repeatedly have accepted appellate jurisdiction where the district court had denied arbitration motions by litigants that were not signatories to the relevant arbitration agreement.' They support this contention with a number of cases which simply are not apposite, however, because none of them rule upon the jurisdictional basis for their holdings. Indeed, none of them consider the issue before us."); *Carlisle*, 521 F.3d at 602 ("[I]n none of those cases does it appear that the appellees raised the issue of appellate jurisdiction to review the question on an interlocutory basis."). *See* discussion *infra*, section D.

respondents' claims against them pending arbitration. Petitioners invoked section 16(a)(1)(A) as the jurisdictional basis for their attempted interlocutory appeal. Section 16(a)(1)(A) limits the interlocutory jurisdiction it confers to orders refusing a stay "under section 3."

The text of section 3 could not be clearer: the predicate for a stay under this section is an issue "referable to arbitration under an agreement in writing for such arbitration." Petitioners' status as non-parties to the IMAs, who therefore had to invoke equitable estoppel, signaled that they had no written agreement with respondents requiring respondents to arbitrate their claims against petitioners. *Carlisle*, 521 F.3d at 601 (citing *DSMC* and *Universal*); *DSMC*, 349 F.3d at 683; *Universal*, 428 F.3d at 944 n. 3. Because section 3 requires such an agreement, petitioners could not seek a stay under section 3. In other words, the stay that petitioners requested and the district court refused to grant did not and could not fit within the language of section 3. Because of this, the order rejecting that stay could not be immediately appealed under section 16(a)(1)(A), given that the interlocutory jurisdiction it confers is limited to orders refusing a stay under section 3.

The rules the parties ask the Court to adopt differ in the following respects. Under petitioners' proposed rule, an order refusing a non-signatory's arbitration-related stay request is immediately appealable if the underlying stay application merely *alleged* section 3 as its basis. Under this rule, the label a movant places on its stay application would be the binding jurisdictional determinant for any interlocutory appeal from the application's denial. This would leave interlocutory

appellate jurisdiction, which congressional policy disfavors and must be narrowly construed, entirely in the hands of the stay applicant's lawyer, inviting all manner of gamesmanship and manipulation. In contrast, the rule espoused by respondents recognizes that, regardless of the label a movant might place on its stay motion or a district court might place on its order denying such motion, non-signatories relying on equitable estoppel cannot seek arbitration-related stays under section 3 because, by definition, their stay request cannot satisfy section 3's "referable to arbitration under an agreement in writing" requirement.

In choosing the rule respondents espouse and dismissing petitioners' appeal based on a lack of interlocutory jurisdiction, the Sixth Circuit decision correctly followed *DSMC* and *Universal*, properly rejected *Ross's* reasoning as circular and unpersuasive, and steered well clear of the merits of petitioners' appeal. Whenever possible, such jurisdictional rules must be clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset. The *DSMC/Universal/Carlisle* rule satisfies these criteria. Those, like petitioners, who chose not to enter into arbitration agreements with respondents, and who instead had to resort to equitable estoppel in attempting to force respondents to arbitrate, simply are not eligible for interlocutory appeals under section 16. The federal policy favoring consensual arbitration cannot be stretched far enough to sanction the non-volitional arbitration that petitioners' stay request envisioned. For this reason, the federal proarbitration policy should not affect the outcome of this case. Rather, the Court should adopt the *DSMC/Universal/Carlisle* rule

as the bright-line rule for determining jurisdiction under section 16(a)(1)(A).

ARGUMENT

I. THE REQUESTED STAY FELL OUTSIDE SECTION 3 OF THE FEDERAL ARBITRATION ACT AND, THEREFORE, THE DISTRICT COURT'S REFUSAL TO GRANT IT IS NOT IMMEDIATELY APPEALABLE UNDER SECTION 16(a)(1)(A) OF THE ACT.

The issue in this appeal is not whether respondents' former lawyers (Curtis) and accountants (Andersen) have the right to compel arbitration. It is whether these defendants – as non-parties to the arbitration agreement who unsuccessfully invoked equitable estoppel in attempting to shoehorn their way into arbitration – have an automatic right to an interlocutory appeal from the district court's refusal to stay respondents' claims against them pending arbitration.

Section 16 "governs the timing of review" of certain arbitration-related orders. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 949 (1995). Some, it makes immediately appealable; others, only after final judgment, if not via 28 U.S.C. § 1292(b). Petitioners invoked section 16(a)(1)(A) as the basis for their attempted interlocutory appeal. It permits an interlocutory appeal from an order "refusing a stay of any action under section 3" of the FAA.[8] This statute

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[8] Section 16(a)(1)(B) permits an immediate appeal from an order "denying a petition under section 4" of the FAA.

conditions interlocutory jurisdiction on the relief the district court refused to grant. Because the only rejected relief that qualifies is "a stay ... under section 3," the decisive question is whether the district court refused to grant petitioners a stay "under" section 3. Petitioners claim it did and on that basis contend the order was immediately appealable under section 16(a)(1)(A).

Petitioners' Brief is sprinkled with references to the wording of section 2 of the FAA, to case law holding that state law applies under the FAA, and to the federal policy favoring arbitration, as if they all trump the language of section 3. Petitioners pretend only state law is involved in the interpretation of section 3. There is, however, abundant federal law involved in interpreting section 3 – the words Congress wrote in section 3 and this Court's decisions precisely defining the federal policy favoring arbitration. Petitioners simply close their eyes to both.

When Felix Frankfurter was a law professor, he is said to have taught three rules for statutory interpretation: (1) read the statute, (2) read the statute, and (3) read the statute.[9] Petitioners' Brief evades all three. It is impossible to arrive at a sensible understanding of section 3 stays – and thus of section 16(a)(1)(A) interlocutory jurisdiction – without carefully reading section 3. Textual analysis of this section reveals language incompatible with petitioners'

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[9] Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," *Benchmarks*, 196, 202 (1967); *see also* J.P. Stevens, "The Shakespeare Canon of Statutory Construction," 140 U. Pa. L. Rev. 1373, 1374-76 (April, 1992) ("Read the statute" and "Read the entire statute.").

contention that non-parties to arbitration agreements who invoke equitable estoppel when seeking stays pending arbitration do so under section 3.

Petitioners' Brief, like the *Ross* motion panel ruling on which they relied below, avoids section 3's language, espousing instead a policy-driven justification for blanket interlocutory jurisdiction over "all orders hostile to arbitration." Pet. Br., p. 23. In making this argument, petitioners recast the federal policy favoring consensual arbitrations by assuming its goal is to foster expeditious claims resolution, even if that means forcing litigants on both sides of a dispute into an arbitration neither side intended or conceived.[10] This mistaken assumption drives their argument that any order antithetical to this goal must be immediately appealable. Freed of the textual constraints of section 3, they offer up judicial sanction for qualified-immunity appeals as an apt comparison. Petitioners' argument is flawed, not merely because it avoids any real textual analysis of section 3, but also because it misinterprets the goal of federal arbitration policy.

At first pass, this case appears to put two important federal policies recognized by this Court on a collision course with one another – the policies regarding interlocutory appeals and arbitration. This turns out to be an avoidable collision, however, because the issues in this case implicate the former, but not really the latter. There long has been "a firm

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[10] Such is petitioners' evident zeal for this brand of dispute resolution that one naturally wonders why they did not choose it nine years ago.

congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy." *Abney v. United States*, 431 U.S. 651, 656 (1977). This policy recognizes that interlocutory appeals risk "unwise use of appellate courts' time" unless limited to "categories of orders" presenting "neat abstract issues of law" (as opposed to those requiring fact-intensive inquiries), and unless careful attention is paid to the prospect that, through manipulation, an exception could create a flood of unintended interlocutory appeals. *Johnson v. Jones*, 515 U.S. 304, 315-17 (1995); *see also Abney*, 431 U.S. at 663.

Despite its authority to create exceptions by rule prescription, 28 U.S.C. § 1292(e), the Court generally has deemed it the wiser course to let Congress navigate the interlocutory appeal waters on its own. Although the rule of *Baltimore Contractors v. Bodinger*, 348 U.S. 176 (1955), has been discarded, the Court's observation on Congress's role in defining and refining interlocutory jurisdiction remains illustrative:

> When the pressure rises to a point that influences Congress, legislative remedies are enacted. The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction.... The choices fall in the legislative domain.

Id. at 181-82. Half a century ago, Congress responded to such pressure by allowing courts the discretion to allow interlocutory appeals on a case-by-case basis. It enacted 28 U.S.C. § 1292(b), whose "screening procedure serves the dual purpose of ensuring that [interlocutory] review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474-75 (1978).[11]

At various times, Congress has opted to create special categories of interlocutory appeals. One such statute, section 16 of the FAA, was enacted in the wake of *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), in which the Court curtailed interlocutory appellate jurisdiction over stay denials. Enactments such as section 16 nevertheless are subject to the rule that statutes authorizing appeals must be strictly construed. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 43 (1983). Moreover, "jurisdictional rules should be, to the extent possible, clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset." *DSMC*, 349 F.3d at 683 (citing *Grubart v. Great Lakes Dredge & Dock*, 513 U.S. 527, 547 (1995)).

The relevant jurisdictional statute in this case, section 16(a)(1)(A) of the FAA, works in tandem with

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[11] Rule 23(f), adopted in 1998 under power conferred by 28 U.S.C. § 1292(e), represents a recent exception to the policy against interlocutory appeals. It does not, however, provide for automatic interlocutory appeals. Instead, like section 1292(b), it incorporates judicial screening (in this instance, by the court of appeals) as a safeguard.

section 3 of the FAA to define interlocutory jurisdiction over orders refusing arbitration-related stays, in that the meaning of the former depends on the meaning of the latter. Thus, the language of both must be carefully studied as well as strictly construed.

A. Language In Sections 3 And 16(a)(1)(A) Of The FAA Precludes Automatic Interlocutory Appellate Jurisdiction Over An Order Denying A Motion For A Stay Pending Arbitration That Was Predicated On The Non-Signatory Applicant's Assertion Of Equitable Estoppel.

1. The language of section 3 and section 16(a)(1)(A)

A single, common word – "under" – forms a crucial part of both section 3 and section 16(a)(1)(A). Section 3 authorizes district courts to stay an action due to "any issue referable to arbitration *under* an agreement in writing for such arbitration"; section 16(a)(1)(A) confers immediate appellate jurisdiction over orders refusing stays "*under*" section 3. (Emphasis added.) Though crucial, there is no mystery about the meaning of "under" in either section.[12]

In section 3, "referable to arbitration *under* an agreement in writing for such arbitration" must mean the stay applicant and the stay opponent have a written agreement that requires them to arbitrate

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[12] The Court has observed that "[t]he word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani v. INS*, 502 U.S. 129, 135 (1991).

claims between them. *IDS Life Ins. Co. v. Sunamerica, Inc.*, 103 F.3d 524, 529 (7th Cir. 1996) (Posner, J.) ("Although not expressly so limited, section 3 assumes and the case law holds that the movant for a stay, in order to be entitled to a stay under the arbitration act, must be a party to the agreement to arbitrate, as must the person sought to be stayed."); *DSMC*, 349 F.3d at 684 ("There are no issues referable to arbitration under an agreement in writing between Convera and DSMC because there is no arbitration agreement between those two parties.... As the Seventh Circuit explained in *IDS Life*, '[t]he issues in the suits against the nonmembers may be substantively related to the issues in the other suits, but they are not referable to arbitration "under an agreement in writing for such arbitration," because there is no such agreement between these parties.... The statute has no application to "issues" in cases between different parties.'").

In section 16(a)(1)(A), a stay "*under* section 3" must mean that the stay requested and refused fit within section 3. Every circuit addressing this situation has resolved the applicability of section 16(a)(1)(A) by asking itself (not with these exact words but in effect) the following question: Is the stay the applicant requested and the district court refused one that fits within section 3?[13] This question is apt because, in order for a ruling denying an arbitration-related stay

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[13] *DSMC*, 349 F.3d at 683-85; *Universal*, 428 F.3d at 942-45; *cf. Ross*, 478 F.3d at 99-100; *see also Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 391-92 (5th Cir. 2006) (where the arbitration stay issued "could not have been issued pursuant to 9 U.S.C. § 3," the court of appeals held section 16(b)(1), which precludes interlocutory appeals from orders granting stays, did not apply)

to constitute an order refusing a stay "under section 3," there logically would have to be some basis, some room, *within* section 3 for granting the particular stay requested. Whatever legal ground there might be for granting non-parties arbitration stays based on equitable estoppel, there is no basis for doing so *under* (*i.e.*, found within) section 3. *DSMC*, 349 F.3d at 684 (citing *IDS Life*, 103 F.3d at 529). Nothing in the language of section 3 suggests otherwise.

To the extent section 3 speaks of stays pending arbitration, it does so exclusively in terms of arbitration mandated by a written agreement. Because petitioners were not parties to the written agreement between respondents and Bricolage, or to any other agreement containing an arbitration clause, no written agreement required respondents to arbitrate with petitioners.[14] This forced petitioners to argue they were entitled to arbitration and a correlative stay because equitable estoppel – not the terms of a written agreement – required respondents to arbitrate their claims against petitioners.

Although non-parties asserting equitable estoppel routinely claim to invoke a signatory's obligation to arbitrate under the terms of the signatory's written agreement with someone else, in actuality they seek to bind a signatory to an arbitral obligation *beyond* that signatory's strictly contractual obligation to arbitrate. *See DSMC*, 349 F.3d at 683. Such is the inherent

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[14] Initially, as a fallback position, petitioners requested that the district court at least stay the action against them until after respondents' arbitration with Bricolage. Bricolage's bankruptcy ruled out that arbitration, however, rendering this part of petitioners' original stay request moot.

nature of equitable estoppel.[15] A non-signatory's assertion of equitable estoppel in this context is a clear signal it *cannot* claim party status vis-à-vis any applicable arbitration agreement. *See Universal*, 428 F.3d at 944 n. 3 ("the doctrine of equitable estoppel applies only in the absence of a written agreement"). Indeed, the whole purpose of asserting equitable estoppel in this context is to prevent the signatory from avoiding arbitration based on the fact the agreement's terms *do not* obligate the signatory to

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[15] Equitable estoppel typically serves as a substitute for a provable express contract. Richard A. Lord, 3 *Williston on Contracts* § 7:11 ("Where no consideration exists, and is required, the lack of consideration results in no contract being formed in the absence of a substitute for consideration such as ... an estoppel."); *see also Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 643 (Ky. App. 2003) (equitable estoppel substitutes for enforceable contract); *Newsom v. Xenia City School Dist. Bd. of Educ.*, No. C-3-95-173, 1996 WL 1089865, *14 (S.D. Ohio Mar. 25, 1996) (promissory estoppel substitutes for contract claim); *Ufe Inc. v. Methode Elec., Inc.*, 808 F.Supp. 1407, 1415 (D. Minn. 1992) (contract and promissory estoppel claims are "mutually exclusive"). The term "equitable estoppel" and its cousin "promissory estoppel" have been used in many and varied circumstances – so many, in fact, that Professor Williston once observed, "When a lawyer or judge does not know what other name to give for his decision to decide a case in a certain way, he says there is an estoppel ...." 4 *Williston on Contracts* § 8:5. Although the merits are not at issue, it is fair to characterize as somewhat loose courts' use of "equitable estoppel" to describe a situation in which a true stranger to an arbitration agreement (such as petitioners) attempts to force one of the agreement's signatories to arbitrate – especially since in most such cases (this one included) the signatory never made any unfulfilled promise or false representation to the non-signatory, the usual hallmarks of estoppel.

arbitrate with a stranger to the agreement. *Id.*[16] If the case were "referable to arbitration" because the stay applicant and the stay opponent have "an agreement in writing for such arbitration," surely the stay applicant would say so and never mention equitable estoppel. When the non-signatory stay applicant instead invokes equitable estoppel, that marks the case as one *not* referable to arbitration under a written arbitration agreement. Petitioners' Brief (perhaps unwittingly) acknowledges the claims against them are not referable to arbitration under an agreement in writing for such arbitration, stating "that respondents' claims are 'referable to arbitration' *under the doctrine of equitable estoppel*." Pet. Br., p. 14 (emphasis added). So, despite self-serving references to section 3 in their stay motion, petitioners necessarily strayed outside the ambit of section 3 in seeking that stay.

2. Section 3's other textual features

In addition to the "referable to arbitration" language, section 3 has other "textual features at odds with" granting a stay to a stranger to an arbitration agreement who invokes equitable estoppel. *See Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 1399 (2008). Section 3 authorizes a district court to entertain and grant an application for a stay pending arbitration. It specifies three conditions that, if met, require the granting of such an application. All three conditions contemplate a written arbitration

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[16] *See* Arthur Andersen's Memorandum in Support of Motion to Stay Proceedings Pending Arbitration, p. 2 ("well-established principles of equitable estoppel prevent Plaintiffs from avoiding arbitration solely because Andersen was not a signatory to the Agreements").

agreement that mutually obligates the stay applicant and the opposing party to arbitrate. The three conditions are: (1) (as already mentioned) that the suit involves an "issue referable to arbitration under an agreement in writing for such arbitration," (2) that the stay would last "until such arbitration has been had in accordance with the terms of the agreement," and (3) that the stay "applicant is not in default in proceeding with such arbitration." These three conditions circumscribe a section 3 stay – in other words, a stay *under* section 3. Because a binding written arbitration agreement is the *sine qua non* of each condition in section 3, these three textual references, individually and together, carry connotations incompatible with non-parties to arbitration agreements, such as petitioners, seeking a stay pending arbitration against a party to such an agreement under equitable estoppel.

Language in section 3 precluding a stay when the applicant is "in default" assumes the stay applicant's obligation to comply with the agreement's specific terms for proceeding to arbitration. By definition, a stranger to an arbitration agreement is not obligated to comply with its terms. The fact section 3 includes this "not in default" language supports limiting the statute's application to parties bound to comply with the arbitration agreement's terms, and not extending it to non-parties invoking equitable estoppel. This, of course, would disqualify petitioners.

Language in section 3 indicating that a stay granted under this statute lasts "until such arbitration has been had in accordance with the terms of the agreement" also is incompatible with a stranger to such an agreement seeking a stay based on equitable estoppel. This statutory language contemplates a stay

pending arbitration between parties who are mutually bound to arbitrate with one another according to procedures specified in terms to which each side agreed.[17] A stranger's stay request based on equitable estoppel, however, perforce envisages arbitration between parties who are *not* mutually bound by the terms specified in any agreement. Such a request presupposes the signatory is obligated to arbitrate *beyond* the written agreement's explicit terms. *See DSMC*, 349 F.3d at 683. The fact section 3 refers to arbitration "in accordance with the terms of the agreement" further supports limiting the statute's application to parties bound by the agreement's terms, and not extending it to non-parties invoking equitable estoppel. This, again, would disqualify petitioners.

In sum, there are three separate textual references to a written arbitration agreement in section 3. Taken together, they constitute the conditions for granting a stay under this section. In essence, they define a section 3 stay. Because each such condition contemplates an arbitration mandated by a written agreement, a non-signatory's request for an arbitration stay based not on the agreement's explicit terms, but instead on equitable estoppel, does not fall within section 3. Petitioners' stay request, therefore, cannot be considered one brought "under section 3." It follows that the district court's ruling rejecting it, whatever its

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[17] Although section 3, not section 4, is at issue in this case, the Court has characterized similar language in section 4 as signaling not the "right to compel arbitration of any dispute at any time," but the right to compel arbitration "*in the manner provided for in [the parties'] agreement.*" *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75 (1989) (emphasis and bracketed words original).

label, was not in substance "an order ... refusing a stay under section 3" of the FAA. Because section 16(a)(1)(A) interlocutory appellate jurisdiction exists only when the order refuses a stay under section 3, the predicate for automatic interlocutory jurisdiction is missing from this case.

Respondents do not contend litigants such as petitioners can never ask to stay an action pending arbitration, only that they cannot do so "under section 3." *See DSMC*, 349 F.3d at 684-85 ("District courts may certainly consider stays in circumstances such as these as a matter of discretionary control of their docket.") (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 n. 23 (1983), and *IDS Life*, 103 F.3d at 530)); *see also Toledano v. O'Connor*, 501 F.Supp.2d 127, 151-54 (D.D.C. 2007). Respondents also do not contend that non-parties to arbitration agreements asserting equitable estoppel have no pathway to interlocutory appeals, only that automatic interlocutory appeals under section 16(a)(1)(A) are unavailable to them, leaving section 1292(b) as their only immediate alternative.[18]

3. Petitioners' "label" test

Petitioners offer a completely different characterization of the pathway to section 16(a)(1)(A) interlocutory appellate jurisdiction. To them, it depends on the kind of application (or, as they call it,

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[18] Petitioners did not ask the district court to approve a permissive interlocutory appeal under section 1292(b), although on appeal they belatedly asked the Sixth Circuit in a footnote to treat their appeal as such. Appellants' [Petitioners'] Reply Brief in 6th Cir. Case No. 06-5290, p. 14 n. 6. The court of appeals did not do so.

"motion") they filed. Petitioners argue that "a motion seeking a Section 3 stay" is a requirement of section 16(a)(1)(A) "[o]n its face ...." Pet. Br., p. 19. Petitioners' characterization of section 16(a)(1)(A) jurisdiction is odd, given that this statute actually does not mention the application at all. As noted above, it only mentions the relief refused. This discrepancy initially seems insignificant, for if, as demonstrated, the district court's order did not refuse a stay under section 3, it follows that petitioners' application could not be considered (to use their words) "a motion seeking a Section 3 stay." Pet. Br., p. 19.

The problem with petitioners' misplaced emphasis on the nature of the motion filed, though, is where it seems to take their argument in favor of interlocutory appellate jurisdiction. From there, they appear to leap to this conclusion: "Thus, Section 16(a)(1)(A) provides for jurisdiction so long as the appellant's motion *alleges* entitlement to a Section 3 stay." Pet. Br., p. 20 (emphasis original). In other words, the essence of petitioners' argument is that the *rubric* of the underlying stay application dictates whether its denial triggers section 16(a)(1)(A) interlocutory appellate jurisdiction. Mere incantation of the correct words, in petitioners' estimation, automatically entitles an unsuccessful stay applicant to an interlocutory appeal and the stay-like delay it naturally occasions. Petitioners confidently tout this as a "clear, bright-line" jurisdictional test.

The label a movant affixes to a motion, however, never controls appellate jurisdiction over the order denying it, just as the label a district court affixes to an order does not dictate its appealability. *United States v. Sisson*, 399 U.S. 267, 279 (1970); *Workman v.*

Bredesen, 486 F.3d 896, 904 (6th Cir. 2007). To treat the stay application's label (*e.g.*, "Motion for Stay Under 9 U.S.C. § 3") as a jurisdictional determinant would allow opportunistic parties bent on delay to achieve it by manufacturing their own interlocutory appellate jurisdiction, a circumstance this Court's decisions have been careful to prevent. *See, e.g.*, *Abney*, 431 U.S. at 663.

Having promised a test that is easy for courts to apply, petitioners propose a gimmick that would be simple enough for clued-in appellants to check off and, what's more, easy for them to manipulate. It would leave the existence of interlocutory appellate jurisdiction entirely in the hands of the stay applicant's lawyer, inviting all manner of gamesmanship. If the lawyer simply knows enough to frame an application that facially "*alleges* entitlement to a Section 3 stay," Pet. Br., p. 20 (emphasis original), the application's denial would trigger an automatic right to an interlocutory appeal. And what of the signatory to an arbitration agreement whose lawyer does not know enough to use the magic words, but who really is seeking to stay an action between parties to that arbitration agreement, precisely as section 3 contemplates? Presumably a court of appeals exploring its interlocutory jurisdiction in such a case would have to look beneath the surface to the substance of the denied stay application. So much for a "clear, bright-line test."

Moreover, apparently to blunt criticism that their "label" test could be too easily manipulated, petitioners propose an addendum to it that they claim would further judicial economy – district courts could certify as "frivolous" questionable interlocutory appeals from

denials of arbitration-related stays. This sounds reassuring, but given that petitioners would set the bar for fully vested interlocutory appellate jurisdiction so low – *i.e.*, it would exist "so long as the appellant's motion *alleges* entitlement to a Section 3 stay" (Pet. Br., p. 20 (emphasis original)) – it is difficult to imagine how any such district court certification could short-circuit any such appeal once interlocutory appellate jurisdiction vests. At most, a certification of this kind likely would be, as in the qualified immunity context, simply another issue the court of appeals must review in the interlocutory appeal. So much for "judicial economy."

The only truly "clear, predictable, bright-line" test for interlocutory jurisdiction under section 16(a)(1)(A) is that provided by the *DSMC/Universal/Carlisle* rule.[19] Under this rule, parties not subject to a written

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[19] As the Sixth Circuit observed, the Second Circuit's contrary reasoning in *Ross* is circular and unpersuasive. The *Ross* motion panel ruling, on which petitioners relied below, suggests that section 3's writing requirement is met simply by showing that a written agreement created the signatory's "arbitration obligation." *Ross*, 478 F.3d at 99. (*Ross* does not mention any other condition for satisfying the writing requirement, such as the "in default" language, discussed *supra*.) *DSMC* anticipated and refuted this interpretation when it stated – albeit regarding section 4 – that it is not enough "that there be a written agreement somewhere in the picture." *DSMC*, 349 F.3d at 683. *Ross's* minimalist interpretation presents two distinct paradoxes. First, section 3 provides for a mandatory stay when its conditions are met. If, as *Ross* mistakenly postulates, all it took to qualify as a section 3 stay were a written arbitration agreement somewhere in the picture, stays sought under equitable estoppel automatically would be granted. The first paradox is that this clearly is not happening – as the many interlocutory appeals from arbitration-related stay denials prove. The second paradox that *Ross's*

arbitration agreement who instead must resort to equitable estoppel have no access to the mandatory stay provisions of section 3, nor, by extension, to automatic interlocutory appeals under section 16(a)(1)(A). *DSMC*, 349 F.3d at 685. The Court's adoption of this rule, which litigants and courts alike can apply "with a fair degree of certainty from the outset," *id.* at 683, would eliminate several unattractive prospects at once – jurisdictional manipulation, fuzzy labels that stay applicants or district courts might use, and the "multifactor factual and legal inquiry" that a court of appeals otherwise would have to use to determine the applicability of equitable estoppel, if jurisdiction depended on it. *Id.* at 683-84.

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minimalist interpretation of section 3 presents is that it would render section 16(a)(1)(A) a nullity. Under *Ross's* interpretation, the only stay applications denied would be those where the arbitration obligation was not based on a written contract. All parties and *amici* herein agree that, where there is no written arbitration obligation anywhere in the picture, section 3 is inapplicable. In other words, the only stay applicants with something to appeal (a stay denial) would be those whose stays, all parties and *amici* agree, clearly would fall outside section 3 and therefore also outside section 16(a)(1)(A). Under this second paradox, section 16(a)(1)(A) would constitute the veritable "sleeves out of the vest," granting appellate rights to those who would not need to appeal, while denying such rights to the only litigants who would need to appeal. By proposing the even more minimalist "label" test (*i.e.*, it qualifies as a section 3 stay if the applicant labels it one), petitioners avoid having to explain away the two paradoxes that *Ross's* misinterpretation of the section 3 writing requirement presents.

B. The Policy Underlying The FAA, Which Favors Consensual Arbitration, Does Not Justify Recognition Of An Automatic Right To An Interlocutory Appeal For A Non-Party To An Arbitration Agreement Who Unsuccessfully Sought To Stay A Signatory's Action Based On Equitable Estoppel.

The recurring theme of petitioners' argument is that the Court cannot reject their lenient "label" test in favor of the *DSMC/Universal/Carlisle* rule without offending federal arbitration policy. This concern is unfounded. It is true federal policy fosters arbitration by broadly reading the reach of parties' contractual commitments to arbitrate disputes *with one another*, whenever those parties disagree about their commitments' reach. But this policy does not translate into either tolerating attempts by third parties who are strangers to arbitration agreements to parasitize contracting parties' arbitration obligations through equitable estoppel, *or* guaranteeing such strangers interlocutory appellate rights when their attempts fail. These are simply beyond the purpose and scope of the federal arbitration policy.

As noted at the outset of this discussion, petitioners mistakenly assume the federal arbitration policy's goal is to foster expeditious claims resolution, even if it means forcing litigants on both sides of a dispute into an arbitration neither side ever intended or conceived. The FAA placed arbitration agreements "'upon the same footing as other contracts.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). The cornerstone of federal arbitration policy,

therefore, is parties' freedom to contract for arbitration when and how they wish to do so. Arbitration under the FAA is a creature of contract, *Hall Street Associates*, 128 S.Ct. at 1399, indeed of a written contract, a fact borne out not only by section 3 but also by section 2. In *First Options v. Kaplan*, 514 U.S. at 945, the Court stated that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration ...." The Court consistently has held the contesting parties' arbitration agreement takes precedence over any "general policy goals" related to arbitration. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). Indeed, the very purpose of the federal policy "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms.'" *First Options*, 514 U.S. at 947 (citations omitted). For decades, the Court's arbitration decisions consistently have honored this purpose and resisted its expansion. In *Dean Witter Reynolds v. Byrd*, 470 U.S. at 219, the Court stated:

> The legislative history of the [Federal Arbitration] Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement – upon the motion of one of the parties – of privately negotiated arbitration agreements.

See also id. at 221 ("[P]assage of the [FAA] was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."); *AT&T Tech., Inc. v. Communications Workers of America*, 475 U.S. 643, 648-49 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.").

Because arbitration under the FAA is, by definition, "a matter of consent, not coercion," one litigant's attempt to force another to arbitrate is inimical to the FAA's proarbitration policy. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties."). This is not to say whether such an effort can succeed, *see DSMC*, 349 F.3d at 683, and *Universal*, 428 F.3d at 945; rather, that it is beyond the purpose and scope of the federal proarbitration policy, which is limited to enforcing *volitional* arbitration, to foster *non-volitional* arbitration. 1 *Domke on Commercial Arbitration* § 13:1 ("Although the federal policy favoring arbitration is strong, it cannot be construed to include parties that were not intended to be part of the original contract."). As the Fifth Circuit observed in *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002) (Higginbotham, J.),

> [W]e will read the reach of an arbitration agreement *between parties* broadly, but that is a different matter from the question of who may invoke its protections. An agreement to arbitrate is a waiver of valuable rights that are both personal to the parties and important to the open character of our state and federal judicial systems – an openness this country has been committed to from its inception. It is then not surprising that to be enforceable, an arbitration clause must be in writing and signed by the party invoking it.

Id. (emphasis added).[20]

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[20] Although petitioners did not mention the issue in their Petition, they appear to ask the Court to decide whether, under section 3, an arbitration agreement not only must be in writing but also physically signed by the party to the agreement who is invoking it. Pet. Br., p. 38. To the extent petitioners intend this, it is a red herring. The Sixth Circuit never addressed this issue, this clearly is not what the litigants or the court of appeals meant by "non-signatories," and petitioners are not within the class of litigants who would be affected by such a ruling (*i.e.*, parties to the agreement who did not, for some reason, sign it). Moreover, "non-signatories" is a term petitioners themselves first used, to describe their status vis-à-vis the IMAs, both before the district court and the Sixth Circuit. It also is the term the courts used in *DSMC*, *Universal*, *Ross*, and this case to denote non-parties to arbitration agreements (as do respondents herein). None of these cases addressed any distinction there might be between a party to an arbitration agreement who actually signed it and a party to an arbitration agreement whose signature for some reason was not physically affixed to it. Courts routinely employ "non-signatories" in the arbitration context as synonymous with non-parties, without any apparent intention of creating the "signature requirement" with which Petitioners' Brief seems preoccupied. If this issue eventually matures into a serious dispute among the

When parties commit in writing to arbitrate disputes with one another and one party later needs a mandatory stay pending arbitration, an order compelling arbitration, or an immediate appeal from an order denying either *merely in order to bring about the arbitration their agreement originally contemplated*, it is easy to see how guaranteeing them access to these means of enforcement would further the federal proarbitration policy. But when a stranger who was not in the picture when the contracting parties committed to arbitrate with one another – a litigant as remote from the parties' "bargain to arbitrate," *Mitsubishi*, 473 U.S. at 628, as the proverbial man in the street – demands the right to use the same means of enforcement *against* one of the contracting parties, the equation necessarily changes.[21]

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circuits, *cf. Westmoreland*, 299 F.3d at 465, the Court would be in a position to resolve it then, in the light of adverse opinions, a direct ruling by a court of appeals, and full briefing.

[21] *Amicus* Chamber of Commerce argues that allowing the Sixth Circuit's rule to prevail would usher in a "signatory-only limitation" under section 3, which the Chamber fears would make it impossible for a non-party to an arbitration agreement to enforce it, even when the agreement explicitly identifies that non-party as someone the parties intend to allow to enforce it against them. That is not this case. First, the IMA in this case indicated that respondents and Bricolage were aware "persons other than the Manager" were giving respondents "tax, legal, and accounting advice," but it did not grant such other persons the right to enforce any part of the agreement. App. 68, 87 & 106. Second, the Sixth Circuit lacked jurisdiction because petitioners were non-signatories forced to invoke equitable estoppel – a theory that, by definition, assumed the absence of a written agreement to arbitrate. *Carlisle*, 521 F.3d at 601 (citing *DSMC* and *Universal*); *DSMC*, 349 F.3d at 683; *Universal*, 428 F.3d at 944 n. 3. The Chamber's "what-ifs" concerning the range of contractual or

It is pure fiction to suggest such strangers have any expectations about arbitration, such that the federal policy should be extended to enfold them. There is no logical connection – indeed, there is inconsistency – between: (a) guaranteeing such strangers access to mandatory stays and automatic interlocutory appeals against one of the contracting parties, and (b) guaranteeing a contracting party's right "to arbitrate only those issues it specifically has agreed to submit to arbitration ...." *First Options*, 514 U.S. at 945. Federal policy must favor the latter.[22]

C. In Coming To The Conclusion It Had No Jurisdiction Over Petitioners' Interlocutory Appeal, The Sixth Circuit Did Not Delve Into The Merits Of The Appeal.

Petitioners claim the Sixth Circuit delved into the merits under the guise of determining its jurisdiction. They claim that, in contrast, they propose a test for interlocutory jurisdiction that would "obviate any need for a court of appeals to conduct detailed factual or legal inquiries merely to ascertain whether the court may consider the merits of an appeal." Pet. Br., pp. 27-28.

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agency theories other non-parties to arbitration agreements might try to use in the future to force signatories to arbitrate with them all fall under the adage that if it is not necessary to decide more, it is necessary not to decide more.

[22] Guaranteeing automatic interlocutory appeals to non-signatories would not further attempts to engineer broader use of arbitration, even if that were the touchstone of federal arbitration policy, for by definition non-signatories do not insist that those with whom they deal enter into arbitration agreements.

The Sixth Circuit did not delve into the merits when it ruled that the rejected stay did not fit within section 3. Determining whether a stay fits within or falls outside section 3 is a routine and necessary part of deciding jurisdictional issues under section 16, since the two statutes operate in tandem.[23] It would have been impossible for the Sixth Circuit to resolve the jurisdictional issue under section 16(a)(1)(A) without determining whether the rejected stay fit within section 3.

Contrary to petitioner's characterization, *DSMC*, *Universal*, and the Sixth Circuit decision show that such determinations do not require "detailed factual or legal inquiries" by courts of appeals. In each case, the court's determination was based on an easily ascertainable fact, one so straightforward that petitioners' own brief (again, perhaps unwittingly) acknowledges it: instead of claiming the suit was "referable to arbitration under an agreement in writing providing for such arbitration," the linchpin for section 3 stays, petitioners, as non-parties to the arbitration agreement, asserted "that respondents' claims are 'referable to arbitration' under the doctrine of equitable estoppel." Pet. Br., p. 14; *see DSMC*, 349 F.3d at 683 (in this context, equitable estoppel asserts an obligation to arbitrate "*beyond* the terms of" any written arbitration agreement) (emphasis original); *Universal*, 428 F.3d at 944 n. 3 ("the doctrine of

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[23] *See, e.g., Brown v. Pacific Life Ins. Co.*, 462 F.3d at 391-92 (section 16(b)(1), which precludes interlocutory appeals from orders granting stays under section 3, did not apply because "the stay could not have been issued pursuant to [section] 3").

equitable estoppel apples only in the absence of a written agreement").[24]

Delving into the merits would have meant deciding the substantive legal issue posed by petitioners' unsuccessful stay application – whether petitioners, as non-parties to the arbitration agreement between respondents and Bricolage, had the right under equitable estoppel to force respondents to arbitrate claims against petitioners and the concomitant entitlement to stay those claims until that occurred. Like the courts in *DSMC* and *Universal*, the Sixth Circuit steered well clear of this determination, a fact petitioners acknowledge elsewhere in their brief. *Carlisle*, 521 F.3d at 599 (noting the merits of petitioners' equitable estoppel argument "need not detain us here, given our determination that we do not have jurisdiction to address the merits of the claims"); Pet. Br., p. 10 (acknowledging the Sixth Circuit "never

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[24] In arguing that the Sixth Circuit delved impermissibly into the merits of petitioners' appeal, Petitioners' Brief also cites a number of opinions in which appellate courts considered and confirmed their jurisdiction under section 16. *See* cases cited at Pet. Br., pp. 21-22. These cases are inapposite. Unlike petitioners' situation, each of the movants in those cases claimed a written agreement that they could invoke. The only challenge in those cases was to the agreement's validity, and the courts held that was not enough to deprive them of appellate jurisdiction, for to hold otherwise would make jurisdiction depend on the outcome of the merits determination. These decisions appear to fit within section 3 and thus section 16 because they all involved a written arbitration agreement that the movant was invoking. In contrast, petitioners' stay cannot fit within section 3 or section 16 because they were non-signatories forced to invoke equitable estoppel – a theory that, by definition, assumed the absence of a written agreement to arbitrate. *Universal*, 428 F.3d at 944 n. 3.

considered" the substance of petitioners' equitable estoppel argument)[25]; *DSMC*, 349 F.2d at 683 (noting "[w]e need not and do not decide" the issue of "the propriety of compelling signatories to arbitrate with non-signatories"); *Universal*, 428 F.3d at 945 (noting its holding "does not mean equitable estoppel cannot be employed to compel arbitration," but rather "is limited to whether Defendants can invoke interlocutory appellate jurisdiction to challenge the merits of the district court's order").[26]

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[25] Petitioners' second "question presented" can be read as implying the Sixth Circuit went further than it did: "Whether Section 3 of the FAA requires a district court to stay claims against non-signatories to an arbitration agreement when the non-signatories can otherwise enforce the arbitration agreement under state law principles of law and equity." Pet. Br., p. i. To be precise, and also to avoid the merits, just as the Sixth Circuit did, this question should have read: "Whether a non-signatory's application for a stay pending arbitration with a signatory falls under section 3 of the FAA when it is based on equitable estoppel principles."

[26] The *Ross* motion panel ruling, on which petitioners relied below, also decided the issue of section 3's applicability in determining interlocutory jurisdiction under section 16(a)(1), although it reached the opposite conclusion. *Ross*, 478 F.3d at 99-100 (holding section 3's "writing" requirement – and hence section 16(a)(1)(A) – satisfied). Even while doing so, that ruling made clear the merits of the appeal remained to be decided. *Id.* at 99 n. 1 ("In ruling on this motion [to dismiss the non-signatories' interlocutory appeal], we make no determination as to whether the district court was correct in holding that appellants are entitled to arbitration via equitable estoppel – a determination that will only be made following full briefing and argument on appeal. This ruling touches only upon our jurisdiction under the FAA to hear such an appeal.").

To support their argument that the Sixth Circuit improperly looked beyond the label on their stay motion and impermissibly delved into the merits, petitioners draw an analogy to interlocutory appeals based on qualified immunity. They argue "once such immunity is claimed and the claim is rejected, the court of appeals has jurisdiction to evaluate the merits of the claim." Pet. Br., p. 26. This analogy undercuts petitioners' argument.

The courts in *DSMC*, *Universal*, and this case determined the existence of section 16(a)(1)(A) interlocutory jurisdiction by asking if the appellant was eligible to seek a section 3 stay. This analytical approach mirrors the practice courts use to determine interlocutory jurisdiction over qualified-immunity appeals. Appellate courts are not required to entertain an interlocutory appeal based on qualified immunity merely because the appellant claimed qualified immunity in the district court. Rather, such courts routinely inquire whether the appellant fits within the class of persons eligible for qualified immunity. *See, e.g.*, *DeSantana v. Velez*, 956 F.2d 16, 19 (1st Cir. 1992) ("To ascertain whether the appellants have a right to an interlocutory appeal requires that we determine whether they would be entitled to raise the defense of qualified immunity"). An appellant who was ineligible to raise qualified immunity at all has no right to file an interlocutory appeal, so his appeal is dismissed for lack of appellate jurisdiction. *Id.* at 19-20 (private actors' claimed qualified-immunity appeal dismissed); *Harrison v. Ash*, 539 F.3d 510, 525-26 (6th Cir. 2008) (same); *Stichting Mayflower Recreational v. City of Park City*, 225 Fed.Appx. 744 (10th Cir. 2007) (same); *Penman v. Korper*, No. 91-15520, 1992 WL 276462 (9th Cir. Oct. 8, 1992) (same). That appellate courts thus

disregard claims or labels of qualified immunity in dismissing such interlocutory appeals bolsters respondents' position that, in order to determine if an appellant is eligible for a section 16(a)(1)(A) interlocutory appeal, a court of appeals first must decide if the appellant's circumstances make him ineligible or eligible for a section 3 stay. If it finds the appellant was ineligible for a section 3 stay, it lacks interlocutory jurisdiction and must dismiss the appeal.

D. To The Extent Petitioners' Status As Strangers To The Arbitration Agreement Invoking Equitable Estoppel Deprives Them Of Opportunities For Mandatory Section 3 Stays, Section 4 Orders Compelling Arbitration, And Automatic Interlocutory Appeals Under Sections 16(a)(1)(A) And 16(a)(1)(B), That Status Is A Consequence Of Their Own Choice Not To Enter Into Arbitration Agreements With Respondents.

Petitioners and *amici* also claim that precluding petitioners from proceeding with their interlocutory appeals under section 16(a)(1)(A) unjustly consigns them to lesser status than they would enjoy if they were signatories, which they claim is contrary to federal policy favoring arbitration.[27] *Amicus* Chamber

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[27] *See* Br. of *Amicus* Washington Legal Foundation, p. 11 (The *DSMC/Universal/Carlisle* test "would assign non-signatories to a class of litigants that would not be able to seek stays under Section 3, to file motions to compel under Section 4, to file immediate appeal under Section 16(a), or to seek protection from

of Commerce curiously suggests the *DSMC/Universal/Carlisle* rule "upsets settled expectations of signatories, as well as those of non-signatories, based on rights bargained for before the dispute arose." Br. of Amicus Chamber of Commerce of the United States, p. 11. Petitioners go further, predicting that barring interlocutory appeals "solely because petitioners were not signatories to the contracts containing the arbitration provision" will not merely deny non-signatories appellate opportunities, but actually doom the centuries-old decisional law upon which non-signatories now enforce arbitration agreements. Pet. Br., pp. 24, 36 ("None of this doctrine can survive, however, if this Court affirms the Sixth Circuit's decision.").

Lest it be forgotten, Curtis and Andersen *chose* their status as non-signatories.[28] It is not as if Curtis never entered into retention agreements with respondents. It did. And it is not as if Anderson lacked the opportunity to require respondents to enter into such an agreement in the twenty years they provided respondents tax advice and accounting services. Surely the lawyers at Curtis and the accountants at Andersen could have drafted arbitration language if they had wanted their potential claims against respondents and their potential liabilities to respondents to be arbitrated. Therefore, if any "expectation" is to be

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appeal under Section 16(b), despite the fact that these parties are entitled to obtain arbitration under the written agreement at issue.").

[28] Petitioners have never suggested they were prohibited or otherwise prevented from entering into arbitration agreements with respondents.

imputed to these particular non-signatories, let it be the expectation that such claims and liabilities would be resolved in court, not in arbitration. As the Fifth Circuit in *Westmoreland* (Higginbotham, J.) observed in discussing similarly sophisticated non-signatories, their choice of a different status is

> no small matter.... These vital distinctions cannot be maintained by simply deploying the standard that the reach of arbitration clauses is to be read broadly, to the distinct problems of their applicability to nonsignatories. Directly put, the courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives. To do so frustrates the ability of persons to settle their affairs against a predictable backdrop of legal rules – the cardinal prerequisite to all dispute resolution.

Westmoreland, 299 F.3d at 467. Simply by requiring respondents to sign arbitration agreements, petitioners could have assured themselves ready access to mandatory section 3 stays and section 4 compulsion orders and, thus, automatic interlocutory appeals under sections 16(a)(1)(A) and 16(a)(1)(B). Given their conscious choice to bypass these available advantages, it frustrates neither petitioners' expectations nor the federal proarbitration policy to require them to ask permission to file interlocutory appeals under 28 U.S.C. § 1292(b), particularly given that Congress already has determined the federal policy can accommodate permissive interlocutory appeals of arbitration-related stays. *See* 9 U.S.C. § 16(b)(1); *Westmoreland*, 299 F.3d at 464-65 (entertaining non-signatories' interlocutory appeal from order granting stay under section 1292(b)).

Apparently as yet another reason not to adopt the *DSMC/Universal/Carlisle* rule, petitioners, like the *Ross* motion panel ruling on which they relied below, allude to the many appellate decisions that have reviewed orders denying arbitration-related stays or refusing to compel arbitration on equitable estoppel grounds, without becoming entangled in interlocutory jurisdiction issues. Pet. Br., p. 36; *Ross*, 478 F.3d at 100. They are correct that a growing number of circuit decisions (now close to fifteen reported opinions) have addressed equitable estoppel as a ground for granting non-signatories arbitration-related stays or orders to compel arbitration, while paying little or no attention to the section 16(a)(1) issues. Only a handful of decisions – *DSMC*, *IDS Life*, *Universal*, and *Carlisle* – have taken these issues seriously and accurately gauged the jurisdictional deficiency.[29] Proving how tempting it is to see unrecognized truth as heresy, petitioners and *amici* dismiss such talk as a threat to the very survival of equitable estoppel and arbitration, and cling for comfort to the steady accretion of appellate decisions continuing to disregard or gloss over the lack of jurisdiction, as if by relative numbers many insensible rulings will outweigh a few sensible ones. Respondents respectfully urge the Court to arrest this trend now and establish the *DSMC/Universal/Carlisle* rule as a bright-line test

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[29] The number of appellate courts failing to recognize the lack of jurisdiction in such cases seems to have increased as the number of district court decisions addressing non-signatories' equitable estoppel arguments in the arbitration context has dramatically increased. By respondents' count, for example, just the reported district court decisions addressing this issue jumped from 7 in 2004, to 14 in 2005, to 23 in 2006, to 34 in 2007.

that allows courts and litigants alike to determine appealability with certainty.

This case is redolent of the time of *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, which also involved interlocutory appeals from stay denials. The unbridled interlocutory appeals of that time, however, did not cluster around equitable estoppel, arbitration, and non-signatories. It appears that, by then, only one appellate decision – *Hughes Masonry Co., Inc. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 840-41 (7th Cir. 1981) – had addressed equitable estoppel in the context of a non-signatory's attempt to compel a signatory to arbitrate. In other words, the theory was still in its infancy. Twenty years after *Gulfstream*, however, the number of interlocutory appeals from stay denials is growing again, due in no small part to the fact that some appellate courts give only passing attention to the issue of interlocutory jurisdiction where arbitration-related orders are involved. Respondents respectfully urge the Court to hold that the lax approach to interlocutory jurisdiction reflected in most arbitration-related appeals and in petitioners' lenient, easily manipulated "label" test is, in *Gulfstream's* words, "unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals," *id.* at 283, and to adopt instead the *DSMC/Universal/Carlisle* rule. Moreover, to the extent the holding respondents urge – as in the days after *Gulfstream* – might lead to rising pressure of the sort mentioned in *Baltimore Contractors*, 348 U.S. at 181-82, it should be left up to Congress to decide whether amendment of section 16(a)(1)(A) or section 3 is or is not warranted. As these statutes are written, courts of appeals have no jurisdiction to entertain interlocutory

appeals from orders denying arbitration-related stays to non-signatories who invoke equitable estoppel.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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REPLY BRIEF

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No. 08-146

IN THE

Supreme Court of the United States

ARTHUR ANDERSEN, LLP, ET AL.,
Petitioners,

v.

WAYNE CARLISLE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. NON-PARTIES WITH ARBITRATION RIGHTS RECOGNIZED BY STATE LAW MAY ENFORCE THOSE RIGHTS THROUGH SECTIONS 3 AND 4 OF THE FAA. 3

A. Section 3 Makes Relief Available to Stay Applicants Otherwise Entitled to Enforce an Arbitration Agreement. 5

B. Respondents' Interpretation of Section 3 Is Inconsistent with Section 2's Anti-Discrimination Principle and Would Overturn Decades of Decisional Law. 12

II. SECTION 16 PROVIDES APPELLATE JURISDICTION OVER ALL DENIALS OF SECTION 3 RELIEF. 19

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Anaconda v. Am. Sugar Ref. Co.,
322 U.S. 42 (1944) 4, 15

Apostol v. Gallion,
870 F.2d 1335 (7th Cir. 1989) 22

ATSA of Cal., Inc. v. Cont'l Ins. Co.,
702 F.2d 172 (9th Cir. 1983) 7, 8

Behrens v. Pelletier,
516 U.S. 299 (1996) 20, 21, 23

Bernhardt v. Polygraphic Co.,
350 U.S. 198 (1956) 12

Bradford-Scott Data Corp. v. Physician Computer Network,
128 F.3d 504 (7th Cir. 1997) 22

Campbell v. Gen. Dynamics Gov't Sys. Corp.,
407 F.3d 546 (1st Cir. 2005) 5

Carroll v. United States,
354 U.S. 394 (1957) 20

Citrus Mktg. Bd. of Isr. v. J. Lauritzen A/S,
943 F.2d 220 (2d Cir. 1991) 6

Daisy Mfg. Co. v. NCR Corp.,
29 F.3d 389 (8th Cir. 1994) 24

Davidson v. Becker,
256 F. Supp. 2d 377 (D. Md. 2003) 8

Deloitte Noraudit A/S v. Deloitte Haskins & Sells,
9 F.3d 1060 (2d Cir. 1993) 24

DSMC Inc. v. Convera Corp.,
349 F.3d 679 (D.C. Cir. 2003) 23, 24

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 12

Fisser v. Int'l Bank,
282 F.2d 231 (2d Cir. 1960) 16

Genesco, Inc. v. T. Kakiuchi & Co.,
815 F.2d 840 (2d Cir. 1987) 24

Griggs v. Provident Consumer Discount Co.,
459 U.S. 56 (1982) 22

Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1988) 9

IDS Life Insurance Co. v. Sunamerica, Inc.,
103 F.3d 524 (7th Cir. 1996) 5, 6, 7, 10

In re Talbott Big Foot, Inc.,
887 F.2d 611 (5th Cir. 1989) 6

Kimberlin v. Renasant Bank,
295 Fed. Appx. 18 (6th Cir. 2008) 22

Letizia v. Prudential Bache Secs.,
802 F.2d 1185 (9th Cir. 1986) 8

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 17

Mitchell v. Forsyth,
472 U.S. 511 (1985) 20

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 13

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 3

Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.,
339 F.2d 440 (2d Cir. 1964) 6

Omni Tech Corp. v. MPC Solutions Sales, LLC,
432 F.3d 797 (7th Cir. 2005) 19

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983) 2

Perry v. Thomas,
482 U.S. 483 (1987) ..... *passim*

Pritzker v. Merrill Lynch,
7 F.3d 1110 (3d Cir. 1993) 8

Richardson v. McKnight,
521 U.S. 399 (1997) 20

Roby v. Corp. of Lloyd's,
996 F.2d 1353 (2d Cir. 1993) 8

Ross v. Am. Express Co.,
478 F.3d 96 (2d Cir. 2007) 7, 11

Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.,
70 F.2d 297 (2d Cir. 1934) *aff'd*, 293 U.S. 449 (1935), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) 9

Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.,
10 F.3d 753 (11th Cir. 1993) 8

Thomas v. Perry,
246 Cal. Rptr. 156 (Cal. App. 1988) 8

Westmoreland v. Sadoux,
299 F.3d 462 (5th Cir. 2002) 18

STATUTES

Federal Arbitration Act,
9 U.S.C. § 2 ..... *passim*
9 U.S.C. § 3 ..... *passim*
9 U.S.C. § 4 ..... *passim*
9 U.S.C. § 16 ..... *passim*
9 U.S.C. § 16(a)(1) 23
9 U.S.C. § 16(a)(1)(A) 3, 15, 25

28 U.S.C. § 1292(b) 14, 15

RULES

Fed. R. App. P. 38 22

Fed. R. Civ. P. 11 21

OTHER

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REPLY BRIEF FOR PETITIONERS

Like the court of appeals, respondents erroneously conflate the merits of petitioners' claim under Section 3 of the Federal Arbitration Act ("FAA")—*i.e.*, whether petitioners have a cognizable claim to relief under Section 3—with the question of whether petitioners were permitted to appeal the district court's denial of their Section 3 motion. As a result, respondents' jurisdictional and Section 3 arguments all depend upon a single faulty premise: that the text of Section 3 renders relief categorically unavailable to non-parties to an arbitration agreement. But respondents' interpretation of Section 3 is demonstrably incorrect.

Contrary to respondents' arguments, nothing in the text of Section 3 precludes petitioners, as non-parties to an arbitration agreement, from obtaining relief if they can otherwise enforce the arbitration agreement under applicable state law. The test for relief under Section 3 is not whether a stay applicant is a *party*, but whether the stay applicant *has rights under the agreement pursuant to applicable state law*. Under the FAA's statutory scheme, Sections 3 and 4 are devices to enforce, rather than limitations upon, state law arbitration rights made applicable by Section 2.

As this Court recognized in *Perry v. Thomas*, 482 U.S. 483 (1987), the question of a non-party's rights under an arbitration agreement is determined by reference to state law principles made applicable by Section 2. *Id.* at 492–493 & n.9. Respondents fail to

offer any reason or explanation why *Perry v. Thomas*[1] does not control this case. Instead, respondents simply argue that only parties may enforce arbitration agreements through Sections 3 and 4, even though this argument upsets the FAA's statutory scheme by exiling an entire category of arbitration rights and obligations recognized by state law—those of non-parties under myriad theories, including third-party beneficiary, agency, and equitable estoppel—outside of the protection of the FAA. In so doing, respondents' argument, like the decision below, violates Section 2's anti-discrimination principle by rendering arbitration agreements *less* enforceable than other contracts. Respondents' theory, if accepted by this Court, would therefore upend several decades of decisional law recognizing that, under the FAA, non-parties may enforce and be bound by arbitration agreements.

Though the defects in respondents' interpretation of Section 3 are sufficient reason to reject respondents' jurisdictional argument, this Court should also make clear that appellate jurisdiction under Section 16 and the availability of relief under Section 3 are analytically distinct issues. Section 16 establishes a broad category of orders—denials of Section 3 and 4 motions—and makes all such orders immediately appealable. Respondents, by contrast, argue that appellate jurisdiction under Section 16 must be decided on the basis of "an easily ascertainable fact," Resp. Br. 42, *i.e.*, whether the appellant is a "party" to

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[1] As respondents cite a different *Perry* (*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)), this brief refers to "*Perry v. Thomas*" to avoid possible confusion between the two *Perry* cases.

the arbitration agreement. Such a test is inconsistent with this Court's cases, which teach that appellate jurisdiction cannot depend on the facts of any given case. As petitioners actually sought and were denied relief under Section 3, Section 16(a)(1)(A) authorizes petitioners' interlocutory appeal of the district court's order.

This Court should therefore hold that the court of appeals had jurisdiction over petitioners' appeal because the order appealed from is within the category of orders made appealable by Section 16, and that non-parties to an arbitration agreement who can otherwise enforce the agreement under applicable state law are entitled to relief under Sections 3 and 4. It should then remand for consideration of the remaining merits of petitioners' argument that they may enforce the arbitration provision.

I. NON-PARTIES WITH ARBITRATION RIGHTS RECOGNIZED BY STATE LAW MAY ENFORCE THOSE RIGHTS THROUGH SECTIONS 3 AND 4 OF THE FAA.

In their opening brief, petitioners explained how the structure of the FAA protects and provides a means to enforce arbitration rights under written arbitration agreements. Section 2 of the FAA, which "is the primary substantive provision of the Act," *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), provides that "[a] written provision [to arbitrate] . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Significantly for present purposes, Section 2 is phrased in the passive voice—it declares that a

written arbitration provision "*shall be* enforceable," but does not limit *who* may enforce or be bound by an arbitration provision. Those questions, along with all other questions concerning the interpretation and revocation of the provision, are left to the state principles of "law and equity" generally applicable to contracts. Pet. Br. 4–6, 31–34; *see also Perry v. Thomas*, 482 U.S. at 492–493 & n.9.

Sections 3 and 4, in turn, provide procedural devices through which rights and obligations made applicable by Section 2 can be enforced in federal court: Section 3 gives putative arbitration defendants the means to arrest improper judicial proceedings so that arbitration might be had in lieu of litigation, while Section 4 provides putative arbitration plaintiffs the means to compel putative defendants to arbitrate. Pet. Br. 6–7; *see also Anaconda v. Am. Sugar Ref. Co.*, 322 U.S. 42, 44 (1944) (Sections 3 and 4 "implement" the policy of Section 2).

Respondents make no effort to reconcile their narrow interpretation of Section 3 with either Section 2 or *Perry v. Thomas*. Instead, they rely exclusively on textual features of Section 3 that they claim are "incompatible" with petitioners' argument. Resp. Br. 24–31. Respondents' textual arguments fail because Section 2, not Section 3, resolves the question of *who* may enforce an arbitration agreement. Section 3 merely makes relief available to persons otherwise entitled to enforce an arbitration agreement.

A. Section 3 Makes Relief Available to Stay Applicants Otherwise Entitled to Enforce an Arbitration Agreement.

Respondents identify three "textual features" that they claim preclude non-parties from using Section 3 to enforce state law arbitration rights under an arbitration agreement. But nothing in Section 3 is inconsistent with Section 2's mandate that state law, rather than the FAA, determines *who* may enforce or be bound to an arbitration agreement.

1. Respondents primarily rely on Section 3's language conditioning the availability of relief on the district court's determination that the "issue involved in such suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3. Citing *IDS Life Insurance Co. v. SunAmerica, Inc.*, 103 F.3d 524 (7th Cir. 1996) (Posner, J.), respondents argue that the phrase "under an agreement" limits Section 3's applicability to the actual parties to an arbitration contract. Resp. Br. 25–26.

Nothing in the text of the "issues referable" provision, however, expressly limits relief to *parties* to the arbitration agreement. Rather, as courts and commentators have noted, an "issue" is "referable to arbitration under such an agreement" for purposes of Section 3 if "the movant is entitled to invoke the arbitration clause, . . . the other party is bound by that clause, and . . . the claim asserted comes within the clause's scope." *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 552 (1st Cir. 2005); 1 Thomas Oehmke, *Oehmke Commercial Arbitration* § 5.5, at 5-12 (3d ed. 2008) (same). The salient question is not whether the Section 3 applicant is a *party* to the

agreement, but whether the applicant is otherwise *entitled* to invoke the agreement under state law principles made applicable by Section 2.

The Seventh Circuit implicitly recognized this principle in its decision in *IDS Life*. In that case, non-parties to an arbitration agreement sought a Section 3 stay on the basis of an identity of issues between the plaintiffs' claims against them and against co-defendants who were parties to the agreement. The Section 3 applicants did not seek a stay for purposes of enforcing their *own* arbitration rights with plaintiffs; rather, the stay sought was a stay pending a *parallel* arbitration between the plaintiffs and the co-defendants involving identical issues. *See* 103 F.3d at 529–530. The Seventh Circuit held that Section 3 only applies to claims involving parties to an arbitration agreement (although it acknowledged that this requirement is *not* found in the text, *see id.* at 529), but was careful to note that the stay applicants did not argue that they were entitled to enforce the arbitration agreement as third-party beneficiaries. *Id.*[2]

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[2] *IDS Life* cited four cases for the proposition that Section 3 only applies to claims involving parties to an arbitration agreement. *See* 103 F.3d at 529. Three were cases, like *IDS Life*, in which courts denied Section 3 stays of claims involving non-parties pending *parallel* arbitrations of related issues; in none of these cases was it contended that the non-parties could enforce or be bound to the arbitration agreement. *See Citrus Mktg. Bd. of Isr. v. J. Lauritzen A/S*, 943 F.2d 220, 224–225 (2d Cir. 1991); *Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.*, 339 F.2d 440, 441 (2d Cir. 1964); *In re Talbott Big Foot, Inc.*, 887 F.2d 611, 614 (5th Cir. 1989). The fourth case recognized that Section 3 would apply to claims involving a non-party, *if* it could

In contrast to the stay applicants in *IDS Life*, petitioners seek a Section 3 stay pending not a parallel arbitration between respondents and co-defendant Bricolage, but rather, an arbitration *between respondents and petitioners* pursuant to the arbitration agreement under rights that petitioners claim under state law.[3] This, then, is the line drawn by Section 3—between those *with* rights and obligations under the arbitration agreement as recognized by applicable state law and those *without* such rights and obligations—not between signatories and non-signatories, as the Sixth Circuit held below, or between parties and non-parties, as respondents now argue. Section 2 of the FAA makes Section 3 or 4 relief available whenever state law generally applicable to contracts allows the applicant to enforce an arbitration agreement. Though the underlying state law principles will determine whether such a claim succeeds, the claim itself is cognizable under Section 3 or 4.

Respondents also protest that equitable estoppel "seek[s] to bind a signatory to an arbitral obligation beyond that signatory's strictly contractual obligation to arbitrate." Resp. Br. 26. But "[i]n every relevant sense," *Ross v. Am. Express Co.*, 478 F.3d 96, 99 (2d Cir. 2007), petitioners seek to arbitrate "under a

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be established that the non-party was bound by the arbitration agreement under theories of agency or alter ego. *See ATSA of Cal., Inc. v. Cont'l Ins. Co.*, 702 F.2d 172, 176 (9th Cir. 1983).

[3] Though petitioners also requested, in the alternative, a discretionary (rather than Section 3) stay pending respondents' arbitration with Bricolage, that request was mooted by Bricolage's bankruptcy filing and is not at issue before this Court.

written arbitration agreement." *Id.* The mere fact that petitioners sometimes simplify their position as an argument that "respondents' claims are 'referable to arbitration' under the doctrine of equitable estoppel," Pet. Br. 14, does not change what equitable estoppel is—an argument that respondents are contractually obligated to arbitrate their claims against petitioners because of a written arbitration agreement. *See also Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 755–756 (11th Cir. 1993) (characterizing equitable estoppel under FAA as party's "contractual[ ] obligat[ion] to arbitrate its claims [against a non-party] *under the terms of the [agreement]*" (emphasis added)).

In this regard, equitable estoppel is no different from other doctrines, such as agency, that courts have recognized as allowing non-parties to enforce or be bound by contractual provisions in arbitration agreements. *See, e.g., Davidson v. Becker*, 256 F. Supp. 2d 377, 384–385 (D. Md. 2003) (collecting cases recognizing non-party enforcement rights on the basis of agency doctrine, including *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993); *Pritzker v. Merrill Lynch*, 7 F.3d 1110, 1121 (3d Cir. 1993); *Letizia v. Prudential Bache Secs.*, 802 F.2d 1185, 1187–1188 (9th Cir. 1986)). Indeed, after this Court remanded *Perry v. Thomas* to the California intermediate appellate court to determine the arbitration enforcement rights of non-parties, that court held that the non-parties were entitled to enforce the arbitration agreement under state law principles of agency, citing, *inter alia*, *Letizia*. *See Thomas v. Perry*, 246 Cal. Rptr. 156, 159 (Ct. App. 1988). These cases, like cases applying equitable estoppel to the issue of non-party rights and obligations, reflect that Section 2 applies to arbitration

agreements the full spectrum of state law relevant to the enforcement and interpretation of contracts. *See* Pet. Br. 5.

Thus, petitioners' equitable estoppel argument is fully consonant with Section 3's issue-referable requirement. Equitable estoppel merely provides the state-law basis for petitioners' argument that the dispute between them and the respondents is "referable to arbitration under" the agreement between respondents and Bricolage.

2. Respondents also point to Section 3's exception for cases where the applicant is "in default in proceeding with such arbitration," 9 U.S.C. § 3, which they claim "assumes the stay applicant's obligation to comply with the agreement's specific terms for proceeding to arbitration," Resp. Br. 29. By definition, respondents continue, non-parties are not "bound to comply with the arbitration agreement's terms." *Id.* Section 3's default provision, however, offers no support for respondents' argument that Section 3's text precludes non-parties from seeking relief.

Under Section 3, stay applicants are in default if they either (1) refuse to participate in an arbitration initiated by the putative plaintiff or (2) fail to raise their arbitration rights promptly after a lawsuit is initiated against them. *See, e.g.*, *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 70 F.2d 297, 299 (2d Cir. 1934) (Hand, J.), *aff'd*, 293 U.S. 449, 453–454 (1935), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988). There is no reason, then, that petitioners could not have been found in default had respondents actually *initiated* arbitration against

them, or had petitioners unreasonably delayed in raising their arbitration rights before the district court; petitioners would have been bound by the same default rules applicable to all Section 3 applicants.

To be sure, the default provision does confirm that Section 3 relief is only available to stay applicants—like petitioners here—who seek a stay so that the plaintiff's claim against *them* can be arbitrated. Stay applicants, like those in *IDS Life*, who merely seek a stay pending arbitration between the plaintiff and co-defendants could not be in "default" with proceeding in arbitration, because they seek *no* arbitration themselves.

3. Respondents finally point to Section 3's requirement that a stay last "until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. Respondents argue that this language "contemplates a stay pending arbitration between parties who are mutually bound to arbitrate with one another according to procedures specified in terms to which each side agreed." Resp. Br. 29–30. But, to the extent this argument is not a mere rehash of the "under an agreement" analysis, respondents' claim is demonstrably wrong.

The arbitration agreements that petitioners seek to enforce each contain clear terms governing any arbitration held thereunder: arbitration is to be "conducted in New York, New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association," held "before at least three arbitrators." J.A. 81, 100, 119. By arguing that these agreements require respondents to arbitrate their claims against petitioners, petitioners' Section 3

motion necessarily contemplates that arbitration would proceed according to these terms. *See Ross*, 478 F.3d at 99 ("Where a party is deemed bound by a written arbitration agreement because of principles of equitable estoppel, that written agreement alone creates, defines, and provides procedures—including the method for selecting the arbitrators—for implementing the arbitration obligation."). Thus, the "terms" language cited by respondents is consistent with enforcement of the arbitration agreement by non-parties otherwise entitled to do so. If a non-party can otherwise enforce the agreement under state law, then a Section 3 stay allows arbitration to be "had in accordance with the terms of the agreement."

4. Respondents wisely make no attempt to base their "party" test on the use of the word "parties" in Section 3. Section 3 provides that if the issue involved is referable to arbitration, the district court "shall on application of one of the parties stay the trial of the action." From the context it is apparent that "parties" refers to the parties to the "*action*," a category not necessarily limited to parties to the arbitration *agreement*.

Similarly, Section 4 provides that "[a] party aggrieved" by the failure of "another" to arbitrate under a written agreement may petition a district court to compel arbitration, provided that the district court otherwise has subject matter jurisdiction over "the controversy between the parties." The context makes clear that the terms "party" and "parties" in Section 4 refer to the parties to the "*controversy*," which are not necessarily the parties to the arbitration *agreement*.

* * * * *

The three textual features of Section 3 cited by respondents therefore do *not* preclude relief under Section 3 to non-parties otherwise entitled to enforce an arbitration agreement under applicable state law. Rather, if (1) non-party stay applicants are otherwise entitled to enforce the arbitration agreement under state law, (2) the plaintiff is bound by the agreement, and (3) the plaintiff's claim falls within the scope of the agreement, then the "issue involved in such suit or proceeding is referable to arbitration under such agreement," and arbitration can be "had in accordance with the terms of the agreement," provided such non-parties are not in "default in proceeding with such arbitration" by having previously refused to arbitrate or delayed unreasonably in asserting a request for a stay pending arbitration.

B. Respondents' Interpretation of Section 3 Is Inconsistent with Section 2's Anti-Discrimination Principle and Would Overturn Decades of Decisional Law.

As respondents rely exclusively on Section 3, they make no effort to harmonize their interpretation of that section with Section 2. But this Court has previously rejected the proposition that Section 3 can be read in isolation from Section 2. *See Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 201 (1956) ("We disagree with" the argument that "§ 3 of the Act stands on its own footing. . . . Sections 1, 2, and 3 are integral parts of a whole."); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must therefore interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit,

if possible, all parts into an harmonious whole." (citations and internal quotation marks omitted)). Respondents' interpretation of Section 3 conflicts with Section 2 and, if accepted by this Court, would effectively overrule decades of decisional law that allows non-parties to enforce and be bound by arbitration agreements.

1. As petitioners explained in detail in their opening brief, Section 2 of the FAA is the "centerpiece" of the FAA. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). Section 2 requires that state principles of law and equity generally applicable to contracts be made applicable to arbitration agreements. *See Perry v. Thomas*, 482 U.S. at 492–493 & n.9 ("A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law."). Section 2 thus establishes a policy of non-discrimination, requiring that arbitration contracts be placed on the same footing as all other contracts. *See* Pet. Br. 4–5, 36.

It is Section 2's anti-discrimination principle that petitioners rely upon—not, as respondents incorrectly assert, the general "federal policy favoring arbitration." *See* Resp. Br. 36–41. Section 2 establishes that the question of *what is required* under a written agreement is answered by reference to state principles of law and equity generally applicable to contracts—principles that necessarily include the various legal and equitable doctrines that give non-parties rights and obligations under a contract.

Respondents' proposed standard—treating party status as the determinative factor regarding the availability of relief under the FAA—conflicts with Section 2's anti-discrimination principle, because it renders arbitration agreements *less* enforceable than contracts generally. If state law doctrines such as third-party beneficiary, agency or equitable estoppel are generally applicable to the enforcement of contracts, then Section 2 requires that such state doctrines apply to arbitration provisions.

2. Respondents attempt to evade this problem by arguing that non-party rights under an arbitration agreement can still be enforced through a district court's inherent power to stay proceedings before it, and if such a discretionary stay is denied, non-parties can request leave to appeal under 28 U.S.C. § 1292(b). Resp. Br. 31. There are several flaws with this argument.

First, there is a vital difference between the *mandatory* stay provided by Section 3 and a district court's (inherent) *discretionary* authority to stay litigation before it. Indeed, when enacting the FAA, Congress provided for mandatory relief precisely because courts, when left to their own devices, had historically evinced hostility toward efforts to enforce arbitration rights. Pet. Br. 4–5. Respondents' proposed alternative would simply serve to take a class of arbitration rights and obligations protected under Section 2—the rights and obligations of non-parties under state doctrines of law and equity generally applicable to contracts—and exile them to the pre-FAA status quo, where such "rights" went unrecognized because of the lack of any mechanism to enforce them.

Second, under respondents' hypothetical regime, if a district court denied a discretionary stay to a non-party who had arbitration rights recognized by state law, and if either the district court or court of appeals denied permissive interlocutory review under Section 1292(b), then a non-party otherwise entitled to arbitrate would have to endure the full burdens of discovery and trial that arbitration is designed to avoid. Presumably on appeal from a final judgment in favor of the plaintiff, a court of appeals would set aside the judgment and order arbitration, but that would mean that the district court's erroneous refusal to stay the case had wasted judicial resources and imposed needless litigation costs on the parties—precisely what Section 16(a)(1)(A)'s provision for immediate appellate review is designed to avoid.

The implausibility of respondents' theory that the FAA limits enforcement rights to parties is especially apparent when considered in the context of Section 4 and non-parties who wish to compel arbitration to assert affirmative claims. A stay pending arbitration, if granted, is only of use to non-party *defendants* who have been sued in ordinary civil litigation; the stay of such an action requires the plaintiff to arbitrate if the plaintiff wishes to obtain relief. *See Anaconda*, 322 U.S. at 45 ("The concept [of Section 3] seems to be that a power to grant a stay is enough without the power to order the arbitration to proceed, for, if a stay be granted, the plaintiff can never get relief unless he proceeds to arbitration."). If Section 4 is unavailable to non-parties, as it is under respondents' interpretation of the FAA, then non-party *plaintiffs* have no means (at least in federal court) to compel arbitration for the assertion of their own affirmative claims. Such non-party plaintiffs presumably could

resort to ordinary civil litigation to assert their causes of action, rather than arbitration, but the policies underlying the FAA are hardly served by denying non-parties the means to compel arbitration if such non-parties otherwise enjoy arbitration rights under applicable state law. Indeed, commencement of litigation might be understood to constitute a *waiver* of arbitration rights. 21 Richard A. Lord, *Williston on Contracts* § 57:17, at 155 (4th ed. 2001).

Several decades of decisional law recognize that non-parties may enforce and be bound by arbitration agreements under the FAA through myriad theories, including incorporation by reference, equitable estoppel, assumption, agency, alter ego/corporate veil piercing, assignment, successor in interest, and third party beneficiary. *See* Pet. Br. 34–36; *see also Fisser v. Int'l Bank*, 282 F.2d 231, 233 (2d Cir. 1960) (rejecting signature requirement and surveying the various theories by which non-parties can be bound to an arbitration agreement under the FAA). Acceptance by this Court of respondents' theory that Sections 3 and 4 categorically do not apply to claims involving non-parties would lay waste to this precedent. Non-party defendants would instead have to rely on the discretion of district court judges to enforce arbitration rights recognized by state law, and non-party plaintiffs would have no recourse at all but to pursue ordinary civil litigation with defendants that refuse a demand to arbitrate.

3. Respondents further argue that non-party arbitration rights are contrary to the FAA's policy of "volitional" arbitration. Resp. Br. 36–41. Yet petitioners' arbitration rights exist solely because of respondents' volitional choices. Respondents agreed to

arbitrate all claims "arising out of or relating to" their investment management agreements. J.A. 80, 99, 118. Had respondents expressly excluded non-party enforcement rights that otherwise exist under the applicable law governing the arbitration provision, then their wishes would of course be respected—the FAA operates "with regard to the wishes of the contracting parties." *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). But where, as here, the respondents expressly agreed, without limitation as to parties, to arbitrate all claims "arising out of or relating to" the investment management agreements, and then chose to assert claims of concerted misconduct against both parties and non-parties, J.A. 34–38, respondents cannot now object that they never "agreed" to arbitration, if the applicable law governing the arbitration provision permits non-party enforcement in these particular circumstances. Petitioners are not "coercing" respondents to accept anything not required by and under the agreements into which respondents voluntarily entered, under the law that governs those agreements.

Indeed, respondents' own authorities undermine their argument on this point. Respondents quote *Domke* for the proposition that the federal policy favoring arbitration "'cannot be construed to include parties that were not intended to be part of the original contract.'" Resp. Br. 38 (quoting 1 Larry E. Edmonson, *Domke on Commercial Arbitration* § 13:1, at 13-2 (3d ed. 2008). But the very next sentence from *Domke* states: "However, even though the arbitration is contractual by nature, a nonsignatory to an arbitration agreement may nonetheless be bound by the agreement under an accepted theory of agency or

contract law." *Id.* In a footnote to that passage, *Domke* further explains that "[a] non-signatory to a contract may be deemed a party to arbitration under the Federal Arbitration Act through application of contract and agency principles. The fact that the party is not covered by the arbitration clause is not dispositive." *Id.* at n.2 (citation omitted).

Similarly, respondents quote at length the Fifth Circuit's broad statement that "'to be enforceable, an arbitration clause must be in writing and signed by the party invoking it.'" Resp. Br. 39 (quoting *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002)). Respondents fail to acknowledge, however, that in *Westmoreland* the Fifth Circuit recognized that [t]here are two circumstances under which a nonsignatory *can* compel arbitration," *id.* at 467 (emphasis added), one of which is the very theory of equitable estoppel that petitioners argued in the Sixth Circuit below: "[W]hen the signatory to the contract containing a [sic] arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Id.*

* * * * *

At bottom, then, petitioners ask that the Court resolve this case just as it did in *Perry v. Thomas*—by recognizing that, under the FAA, state law controls the question of who is entitled to enforce a given arbitration agreement. Such a rule is mandated by the text of Section 2, is necessary to protect the long-recognized rights of non-parties to an agreement to enforce that agreement in certain situations, and is fully consonant with the FAA's focus on "volitional"

arbitration. As the FAA therefore does *not* categorically bar petitioners from receiving relief under Section 3, this Court should remand the case so that petitioners' equitable estoppel argument can finally be considered.

II. SECTION 16 PROVIDES APPELLATE JURISDICTION OVER ALL DENIALS OF SECTION 3 RELIEF.

Respondents' entire jurisdictional theory hinges on the premise that petitioners, as non-parties to the arbitration agreement, could not obtain relief under Section 3. If this Court rejects respondents' interpretation of Section 3, then respondents' appellate jurisdiction argument necessarily fails. That said, this Court should also reject respondents' jurisdictional theory, which is contrary to the text of Section 16 and this Court's cases.

1. Section 16 confers jurisdiction over a broad category of orders: those denying motions seeking Section 3 relief. *See Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797, 800 (7th Cir. 2005) (Easterbrook, J.) ("If a § 3 motion is made and denied, then appellate jurisdiction exists to determine whether the denial was proper."). In resisting this reading, respondents insist that Section 16 requires more—that for a stay request to actually constitute a motion "under Section 3," the appellate court must first determine, in respondents' words, "an easily ascertainable fact," Resp. Br. 42, *i.e.*, whether the appellant is a "party." Thus, though they claim otherwise, respondents' objections inescapably *are* based upon resolution of part of the merits of petitioners' claim: whether petitioners, who claimed a

right to a mandatory stay of judicial proceedings under Section 3, were categorically barred from receiving such relief because of their non-party status. Respondents' argument therefore conflicts with this Court's cases, which teach that "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll v. United States*, 354 U.S. 394, 405 (1957). Instead, appellate jurisdiction "must be determined by focusing upon the *category* of order appealed from, rather than upon the strength of the grounds for reversing the order." *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996) (emphasis added).

Even if respondents were correct that Section 3 relief is unavailable to petitioners, at *worst* that would only serve to defeat petitioners' Section 3 motion, not the existence of appellate jurisdiction. For example, in *Richardson v. McKnight*, 521 U.S. 399 (1997), this Court considered an immunity appeal by prison guards employed by a private contractor. This Court cited *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *Behrens* for the proposition that appellate jurisdiction existed under the collateral order doctrine. 521 U.S. at 402. It then ruled against the prison guards on the merits, holding that they were not entitled to qualified immunity as a matter of law because they were privately employed. *Id.* at 412. If this Court had followed respondents' rule, it would have dismissed the guards' appeal for lack of appellate jurisdiction because the guards' claim of immunity did not "fit" within the class of persons entitled to claim immunity. Instead, this Court followed the rule of *Behrens* and *Carroll* and exercised jurisdiction on the basis that the order appealed from was within the *category* of orders made appealable by the collateral order doctrine: denials of *claims* to immunity from suit.

Indeed, this Court has made clear that appellate jurisdiction is not defeated even by an otherwise frivolous appeal. *See Behrens,* 516 U.S. at 311 (appellate jurisdiction exists even in face of pre-existing categorical rule barring relief sought below). Respondents make no mention of *Behrens*, nor do they attempt to reconcile their jurisdictional argument with its rationale. As a result, even if respondents were correct that Section 3 relief is unavailable in this case, appellate jurisdiction existed in the court of appeals to make that determination.

2. Respondents also argue that petitioners' jurisdictional test makes a motion's label a "jurisdictional determinant [that] would allow opportunistic parties bent on delay to achieve it by manufacturing their own interlocutory appellate jurisdiction." Resp. Br. 33. This argument is unavailing for several reasons.

First, petitioners do not contend that the mere "label" on a motion is determinative in the absence of an actual request for relief under Section 3. What is determinative is whether a litigant actually sought (and was denied) a stay on the basis of Section 3.

Second, both district courts and courts of appeals are well-equipped to deter and, if necessary, punish attempts to manipulate Section 3 and Section 16. A district court may sanction a litigant for filing a frivolous Section 3 motion, *see* Fed. R. Civ. P. 11, and retain jurisdiction of the case pending appeal of the Section 3 denial by certifying the appeal as frivolous, *see* Pet. Br. 28 (discussing certification procedures for immunity appeals approved by *Behrens* and applied by some circuits in Section 16 appeals). For its part, a

court of appeals can dispose of frivolous appeals through summary procedures, *see* Pet. Br. 28–29, and can sanction frivolous appellants, *see* Fed. R. App. P. 38.

Respondents' argument that it is "difficult to imagine how any such district court certification could short-circuit any such appeal once interlocutory appellate jurisdiction vests," Resp. Br. 34, misapprehends the point of certification. The reason for certification is not to "short-circuit" the appeal, which no district court has authority to do, but rather to allow the district court to retain jurisdiction of the case pending appeal of the Section 3 denial, which would otherwise be lost under the divestiture rule of *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). *See Apostol v. Gallion*, 870 F.2d 1335, 1337–1340 (7th Cir. 1989) (Easterbrook, J.) (outlining certification process for district courts to use to retain jurisdiction pending frivolous immunity appeals); *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 506 (7th Cir. 1997) (Easterbrook, J.) (directing district courts to apply *Apostol's* certification process to frivolous Section 16 appeals under the FAA).

3. In the face of widespread commercial practice and several decades of decisional law holding that the FAA, like its New York antecedent, contains no signature requirement, *see* Pet. Br. 38–42, respondents do not defend the actual holding of the Sixth Circuit below: that only *signatories* to an arbitration agreement may invoke Section 3—and by logical extension Section 4, *see Kimberlin v. Renasant Bank*, 295 Fed. Appx. 18 (6th Cir. 2008)—and that non-

signatories therefore are unable to appeal Section 3 and 4 denials through Section 16(a)(1). Pet. App. 2a.

Instead, respondents propose a significantly different test: that only parties to an arbitration agreement (a category that respondents admit may include non-signatories, Resp. Br. 39 n.20) can appeal under the FAA.[4] In not defending the holding of the decision below, respondents pull the props out from under the jurisdictional rationale of that decision and its progenitor, *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003).

The decision below, following *DSMC*, stressed the need for "'clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset.'" Pet. App. 8a (quoting *DSMC*, 349 F.3d at 683). According to the Sixth Circuit below, "'[a]sking whether the parties are *signatories* to a written agreement to arbitrate satisfies these criteria.'" *Id.* (quoting *DSMC*, 349 F.3d at 683) (emphasis added). Although this test is legally erroneous both because appellate jurisdiction cannot turn the *facts* of individual cases, *see Behrens*, 516 U.S. at 311, and because the FAA contains no signature requirement, *see* Pet. Br. 39–43, the "signatory" test at least purports to be "clear, predictable, [and] bright-line." Pet. App. 8a.

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[4] Although all signatories to an arbitration agreement are necessarily parties thereto, not all parties are necessarily signatories, especially given widespread commercial practices involving the use of arbitration provisions in unsigned form contracts. *See* Pet. Br. 41.

Respondents' "party" test for appellate jurisdiction, however, is far removed from the signatory test of the decision below. In cases where a non-signatory's status as a *party* to an arbitration agreement is in dispute, as it frequently is, respondents' "party" test would require a "'multifactor factual and legal inquiry'" of the sort that the Sixth Circuit below eschewed. *See* Pet. App. 8a (quoting *DSMC*, 349 F.3d at 683). That is to say, a court of appeals would have to review, *as a matter of appellate jurisdiction*, a district court's factual findings to determine whether a non-signatory appellant is a party. *Cf. Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 392–395 (8th Cir. 1994) (in Section 16 appeal from denial of Section 4 motion to compel arbitration, reviewing and reversing district court factual determination that non-signatory's course of conduct did not reflect willingness to arbitrate); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1063–1064 (2d Cir. 1993) (reversing, on basis of estoppel, district court factual determination that non-signatory was not bound by arbitration agreement); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845–846 (2d Cir. 1987) (reviewing district court factual findings as to whether non-signatory was a party to arbitration agreement).

Thus, respondents' "party" test would (in the case of non-signatories whose status as parties is disputed) "'require [a court of appeals] to delve deeply into the merits of a case before even deciding whether [it] had interlocutory appellate jurisdiction,'" Pet. App. 8a (quoting *DSMC*, 349 F.3d at 684), which is precisely the approach that the decision below and *DSMC* rejected. Petitioners' test, by contrast, is clear, predictable, bright-line and—unlike the signatory test of the decision below and *DSMC*—consonant with the

text of Section 16 and this Court's rule that appellate jurisdiction is determined on the basis of categories of orders, rather than the facts of individual cases. So long as Section 3 relief has been sought and denied, then a court of appeals has jurisdiction to proceed to the merits of the Section 16 appeal. *See* Pet. Br. 18–29.

* * * * *

Respondents' entire jurisdictional theory rests on an erroneous interpretation of Section 3, and for that reason fails. But even if respondents' interpretation of Section 3 were correct, their jurisdictional argument would still fail, because petitioners' appeal to the court of appeals was from the category of orders made immediately appealable by Congress in Section 16(a)(1)(A): denials of stay requests based on Section 3. This Court should therefore hold that the court of appeals had appellate jurisdiction over petitioners' appeal from the district court's order denying their Section 3 stay motion.

CONCLUSION

For these reasons, as well as those set forth in petitioners' opening brief, this Court should reverse the Sixth Circuit and remand with instructions to consider petitioners' arguments that the district court erred in not granting a Section 3 stay.

Dated: February 2009 Respectfully submitted,

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SUPPLEMENTAL BRIEF

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IN THE
Supreme Court of the United States

ARTHUR ANDERSEN, LLP, ET AL.,
Petitioners,
v.

WAYNE CARLISLE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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October 22, 2008

SUPPLEMENTAL BRIEF

In accordance with Supreme Court Rule 15.8, petitioners submit this supplemental brief in order to direct the Court's attention to a new case that was decided on October 21, 2008, the same day that respondents filed their reply, and therefore not available to be referenced in the reply.

In their brief in opposition, respondents argued that the Second Circuit was not firmly entrenched in the circuit split involving the first question presented because *Ross v. American Express Co.*, 478 F.3d 96 (2d Cir. 2007) ("*Ross I*"), was only the "inchoate" decision of a motions panel, and subject to further revision by a merits panel, which had not yet ruled. Br. Opp. 18-19. On October 21, 2008, the Second Circuit issued its merits decision in *Ross*. *See Ross v. Am. Express Co.*, Nos. 06-4598, 06-4759, --- F.3d ----, 2008 WL 4630314 (2d Cir. Oct. 21, 2008) ("*Ross II*"). This decision further supports petitioners' arguments in favor of certiorari for several reasons.

First, the merits panel's decision resolves any doubts about the Second Circuit's position within the circuit split concerning the first question presented. The *Ross II* court reaffirmed the motions' panel decision in *Ross I* that appellate jurisdiction existed to reach the merits of the non-signatory defendant's claim to arbitration, and expressly acknowledged its awareness of—and disagreement with—the Sixth Circuit's contrary decision below. *Ross II*, 2008 WL 4630314, at *4 & n.2 (citing *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, 521 F.3d 597, 602

(6th Cir. 2008)). Thus, there can be no question that the Second and Sixth Circuits remain on opposite sides of a true circuit split—as each circuit admits. *See* Pet. App. 11a ("[W]e find the Second Circuit's analysis [in *Ross I*] unpersuasive.").

Second, *Ross II* emphasizes the magnitude of this circuit split concerning the first question presented. The *Ross II* court recognized that "a substantial split among the Circuits has now developed over this jurisdictional question." 2008 WL 4630314, at *4 n.2 (citing *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 44 n.6 (1st Cir. 2008)). As the petition noted, *Sourcing Unlimited* acknowledged the circuit split and the Sixth Circuit's place in that split. Pet. 10, 17; *see also Sourcing Unlimited*, 526 F.3d at 44 n.6 (citing *Carlisle*).

Third, *Ross II* underscores the important benefits that would follow a grant of certiorari in this case. By reformulating the first question presented to encompass jurisdiction over appeals from denials of both Section 3 motions for stays *and* Section 4 motions to compel arbitration, respondents tacitly admit that the same legal standard governs both issues. *See* Pet. Reply 9-10. *Ross II* reinforces this point by treating Section 3/Section 16(a)(1)(A) and Section 4/Section 16(a)(1)(B) interchangeably. *See* 2008 WL 4630314, at *4 n.2.[1] Given that every

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[1] *Ross II* only refers to the Section 4 motion in that case, *see* 2008 WL 4630314, at *4 n.2, but *Ross I* is clear that the case involved both Section 3 and Section 4 and their corresponding jurisdictional provisions, Sections 16(a)(1)(A) and16(a)(1)(B). *See Ross I*, 478 F.3d at 98.

court to examine the issue has done the same for purposes of the legal standard applicable to claims involving non-signatories, review of the decision below would effectively serve to stabilize the unsettled law under both sets of provisions.

Finally, *Ross II* illustrates the disparate treatment that similarly-situated litigants receive as a result of this substantial circuit split. In several circuits, including the Second, the courts of appeals would have considered the merits of petitioners' argument that equitable estoppel required arbitration of respondents' claims. But the Sixth Circuit would not even entertain the argument on the basis of its categorical rule that Section 3 does not apply to claims involving non-signatories, a rule that the Sixth Circuit has since extended to Section 4. *See* Pet. Reply 9 (citing *Kimberlin v. Renasant Bank*, No. 07-6040, 2008 WL 4428417, at *2-3 (6th Cir. Sept. 25, 2008)). This Court should therefore seize the present opportunity and put an end to the chaos in the courts of appeals over the applicability of Section 3/Section 16(a)(1)(A) and Section 4/Section 16(a)(1)(B) of the FAA to claims involving non-signatories.

CONCLUSION

For the reasons provided above, in the petition for writ of certiorari, and in the reply to brief in opposition, this Court should grant the petition.

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AMICUS CURIAE BRIEF

114

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WAYNE CARLISLE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT 7

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. STRONG FEDERAL POLICY FAVORING FREEDOM TO CONTRACT FOR ARBITRATION REQUIRES GIVING PLAIN LANGUAGE OF SECTION 3 ITS NATURAL BROAD CONSTRUCTION 12

A. The FAA Requires that Arbitration Agreements Receive the Same Protection as Other Agreements 13

B. Liberal Federal Policy Favors Freedom of Contract in Arbitration Agreements 16

II. SIGNATORY-ONLY LIMITATION FRUSTRATES THE PURPOSES OF THE FAA 18

A. Signatory-Only Limitation Frustrates Freedom to Contract for Defined Arbitration Terms 19

B. Signatory-Only Limitation Fails to Appreciate Realities and Settled Expectations in Complex Commercial Transactions.....23

C. Equitable Estoppel, as Traditionally Applied to All Contracts, Should Apply to Arbitration Agreements 26

CONCLUSION.....29

TABLE OF AUTHORITIES

Page(s)

CASES

AgGrow Oils, LLC v.
National Union Fire Insurance Co.,
242 F.3d 777 (8th Cir. 2001) 25, 28

Allied-Bruce Terminix Co. v. Dobson,
513 U.S. 265 (1995).....17

American Bureau of Shipping v.
Tencara Shipyard S.P.A.,
170 F.3d 349 (2d Cir. 1999) 24, 25

Bartley v. Jefferson Parish School Board,
302 So.2d 280 (La. 1974) 25

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006).....6

Campbell v. General Dynamics Gov't Sys. Corp.,
407 F.3d 546 (1st Cir. 2005)..... 12

Carlisle v.
Curtis, Mallet-Prevost, Colt & Mosle, LLP,
521 F.3d 597 (6th Cir. 2008) 8, 9

Circuit City Stores v. Adams,
532 U.S. 105 (2001).....17, 27

Citrus Marketing Board of Israel v. Lauritzen A/S,
943 F.2d 220 (2d Cir. 1991) 28

Comer v. Micor, Inc.,
436 F.3d 1098 (9th Cir. 2006) 3, 19, 23

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985) ..... *passim*

Deloitte Noraudit, A/S v. Deloitte, Haskins & Sells, U.S.,
9 F.3d 1060 (2d Cir. 1993) 27

DSMC Inc. v. Convera Corp.,
349 F.3d 679 (D.C. Cir. 2003) 8

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 27-28

Ehleiter v. Grapetree Shores, Inc.,
482 F.3d 207 (3d Cir. 2007) 9

First Options, Inc. v. Kaplan,
514 U.S. 938 (1995) 14, 15

Green Tree Financial Corp. v. Bazzle,
539 U.S. 444 (2003) 6

In re Universal Service Fund Telephone Billing Practice Litigation,
428 F.3d 940 (10th Cir. 2005) 8

Interbras Cayman Co. v.
Orient Victory Shipping Co., SA,
663 F.2d 4 (2d Cir. 1981) 25

International Paper Co. v.
Schwabedissen Maschinen & Angalen, GMBH,
206 F.3d 411 (4th Cir. 2000) 27

Long v. Silver,
248 F.3d 309 (4th Cir.), *cert. denied,*
534 U.S. 894 (2001).....9, 27

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995).....17, 22

McCarthy v. Azure,
22 F.3d 351 (1st Cir. 1994).....9

Mitsubishi Motors Corp. v.
Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985).....15, 17

Moses H. Cone Mem'l Hosp. v.
Mercury Constr. Corp.,
460 U.S. 1 (1983).....2, 13, 15, 16

PacifiCare Systems, Inc. v. Book,
538 U.S. 401 (2003).....6

Perry v. Thomas,
482 U.S. 483 (1987).....12, 14, 18, 19

Preston v. Ferrer,
552 U.S. ___, 128 S. Ct. 978 (2008) 6, 16, 17

Ross v. American Express Co.,
478 F.3d 96 (2d Cir. 2007) 9

Shearson/American Express, Inc. v. McMahon,
482 U.S. 220 (1987) 17

Sherer v. Green Tree Servicing, LLC,
548 F.3d 379 (5th Cir. 2008) 12, 21, 22

Southland Corp. v. Keating,
465 U.S. 1 (1984) 2, 17

Vaden v. Discover Bank,
No. 07-773, *cert. granted*,
128 S. Ct. 1651 (Mar. 17, 2008) 6

Ventura Maritime Co. v. ADM Export Co.,
44 F. Supp. 2d 804 (E.D. La. 1999) 25

Vigil v. Sears National Bank,
205 F. Supp. 2d 566 (E.D. La. 2002) 22

Volt Info. Scis., Inc. v. Bd. of Thomas,
489 U.S. 468 (1989) ..... *passim*

Waste Management, Inc. v.
Residuos Industriales Multiquim, S.A.,
372 F.3d 339 (5th Cir. 2004) 9, 19

STATUTES

9 U.S.C. § 1 *et seq.* 1

9 U.S.C. § 2 ..... 1, 9, 13, 21

9 U.S.C. § 3 ..... *passim*

9 U.S.C. § 4 ..... *passim*

9 U.S.C. § 16 ..... *passim*

RULE

S. Ct. R. 37.6 1

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DiLeo, *The Enforceability of Arbitration Agreements By and Against Nonsignatories*, 2 J. Am. Arb. 31 (2003) 21

H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924) 1, 13

Maggio & Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*, 18 Oh. St. J. Dispute Resolution 151 (2003) 2

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This case concerns an issue of fundamental importance to the Chamber of Commerce of the United States of America[1] (the "Chamber") – whether the mechanisms afforded for the enforcement of contractual arbitration rights by the Federal Arbitration Act ("FAA" or "Act"), 9 U.S.C. § 1 *et seq.*, may be invoked only by parties who are signatories to the arbitration agreement. Enacted to ensure the enforceability of privately-made agreements to arbitrate, the FAA's fundamental purpose was "to place an arbitration agreement 'on the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. at 1, 2 (1924)).

Section 2 effectuates the federal policy favoring arbitration by providing that a written arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Sections 3, 4, and 16 implement the declared policy of Section 2 by providing respectively for: a mandatory stay of litigation brought upon "any issue referable to arbitration under an agreement in writing" (§ 3); an

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[1] The parties have consented to the filing of this *amicus curiae* brief. Pursuant to Rule 37.6, the *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, its members, or its counsel made a monetary contribution to preparation or submission of this brief.

order compelling arbitration of any party who fails or refuses to arbitrate "under a written agreement for arbitration" (§ 4); and interlocutory appeal of orders favoring litigation while precluding review of interlocutory orders favoring arbitration. 9 U.S.C. §§ 3, 4 & 16.

For the past twenty-five years the Court's decisions overwhelmingly and consistently have enforced this federal policy, which liberally favors arbitration and encourages private contractual agreements to arbitrate disputes, recognizing that the FAA "creates federal substantive law requiring parties to honor arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); Maggio & Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*, 18 Oh. St. J. Dispute Resolution 151, 153 (2003). Consistent with the text, purpose, and history of the FAA, these decisions require that arbitration agreements be enforced according to ordinary principles of contract and agency law applicable to all contracts, giving due regard to the federal policy favoring arbitration and resolving "any ambiguities as to the scope of the arbitration clause itself ... in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. of Thomas*, 489 U.S. 468, 475-76 (1989). Because the basic objective of the FAA is the enforcement of commercial contracts, it leaves the parties free to define by contract the limitations and scope of their agreement to arbitrate. *Dean Witter Reynolds*, 470 U.S. at 217 (FAA requires courts to enforce the bargain of the parties even

where enforcement results in inefficient use of the judicial system).

The *per se* rule adopted below threatens this fundamental objective. The Sixth Circuit held that appellate jurisdiction under Section 16 was limited to review of motions brought by signatories to the arbitration agreement. There simply is no support in the language or purpose of Section 16 for this result. Instead, it improperly conflates appellate jurisdiction with the merits of the motion because it is necessarily premised on a view that only signatories can invoke the protections of Sections 3 and 4, and only signatories can enforce or be held to arbitration agreements in commercial contracts. While superficially a bright-line rule, intended to promote efficiency and enforce the agreement between those who actually signed the arbitration agreement, this decision ignores the commercial realities underlying many arbitration agreements, as well as centuries of contract law holding that non-signatories can enforce and be held to agreements under ordinary principles of contract and agency law. *See, e.g.*, *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.10 (9th Cir. 2006) (noting "hundreds of years of common law under which nonparties can be contractually liable under ordinary contract and agency principles"); 1 Larry E. Edmonson, *Domke on Commercial Arbitration* Ch. 13 (3d ed. 2008). Moreover, the signatory-only limitation written by the Sixth Circuit into the FAA interferes with the freedom to define by contract the intended scope of private arbitration agreements because it precludes enforcement of freely-contracted arbitration clauses directing that arbitration include claims involving non-signatories.

Not only is this interpretation inconsistent with the text and history of the FAA, it also frustrates the purposes of the Act by setting up a "disfavored" class of disputes and disputants who are locked out of the protections of the FAA. More fundamentally disturbing, a signatory-only rule actually discriminates *against* the enforcement of arbitration agreements because it forecloses enforcement of such agreements by and against non-signatories who, under ordinary principles of contract and agency law, can otherwise enforce and be held to the remaining provisions in the contract containing the arbitration clause.

Limiting the FAA enforcement mechanisms to only signatories impedes the arbitration rights of both signatories and non-signatories in several ways. As petitioners argue, it upsets settled expectations of non-signatories seeking to enforce arbitration rights where they are entitled to enforce the underlying contract under ordinary principles of contract and agency law. But it also upsets settled expectations of signatories in at least three ways: (1) signatories cannot realize bargained-for benefits of a broad arbitration clause defined expressly to cover claims against non-signatories; (2) signatories cannot realize bargained-for benefits of a broad arbitration clause when non-signatories are sued jointly on disputes subject to arbitration and their relationship is such that the signatory is forced to protect its interests in the litigation; and (3) signatories cannot compel arbitration of a non-signatory otherwise bound by the underlying contract under ordinary principles of contract law.

This issue is crucially important to the Chamber, which is the world's largest business federation, representing an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size throughout the country. The Chamber serves as the principal voice of the American business community in the courts by regularly filing *amicus curiae* briefs and litigating as a party-plaintiff in cases involving issues of national concern to American business.

Most fundamental to Chamber members, and to American businesses generally, is the freedom to contract, coupled with the necessary understanding that contract rights will be enforced according to settled expectations, which allows each party to enjoy the benefits of their bargain while being held to its terms. Accordingly, the Chamber generally favors clear, predictable rules that allow businesses to operate with a fair degree of certainty regarding enforcement of their agreements, and does not favor granting rights or imposing obligations for which the parties have not bargained. Although the signatory limitation adopted below purports to have at least some of these features, it does so at the expense of not enforcing freely-bargained arbitration clauses in accordance with the parties' settled expectations based on ordinary principles of contract and agency law. By creating federal substantive law that only contract signatories can enforce arbitration agreements, this decision fails to appreciate the complexity of many commercial disputes, upsets settled expectations of both signatories and non-signatories, based on rights bargained for before the

dispute arose, interferes with freedom of contract, and allows after-the-fact destruction of arbitration rights by parties who seek to avoid their arbitration obligations by jointly suing non-signatories on their claims.

Many Chamber members routinely enter into arbitration agreements because they believe – and recent studies confirm – that arbitration is a relatively efficient, fair, and inexpensive method of resolving disputes. These members rely on rigorous enforcement of the FAA to ensure that they will not be deprived of the real benefits of arbitration. That is why the Chamber has filed *amicus* briefs in other recent arbitration cases, including *Vaden v. Discover Bank*, No. 07-773, *cert. granted*, 128 S. Ct. 1651 (Mar. 17, 2008), *Preston v. Ferrer*, 552 U.S. ___, 128 S. Ct. 978 (2008), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), and *PacifiCare Systems, Inc. v. Book*, 538 U.S. 401 (2003). In this case too, the Chamber seeks to advance its members' continuing interest in full vindication of the federal liberal policy favoring and enforcing arbitration agreements, including the recognition that full vindication requires recognizing that arbitration agreement covering claims against non-signatories should be protected, and that non-signatories should enforce and be bound by arbitration agreements in accordance with ordinary principles of contract and agency law.

STATEMENT

This case arises from a series of investment-management agreements entered into between Bricolage Capital, LLC ("Bricolage") and respondent limited liability companies ("LLCs"), which had been created by the individual respondents to implement the tax and investment advice provided by Bricolage and petitioners Arthur Andersen LLP ("Andersen") and Curtis, Mallet-Provost, Colt & Mosle LLP ("Curtis"). Each agreement contained the following broad arbitration clause (with emphasis added):

> *Any controversy arising out of or relating to this Agreement or the breach thereof*, shall be settled by arbitration conducted in New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

Petitioners were not signatories to the investment-management agreements. The IRS disallowed the tax position claimed by respondents and found that their "leveraged option strategy" was an abusive tax shelter, which eventually resulted in an IRS settlement program that required respondents to pay taxes, penalties, and interest in excess of $25 million.

Respondents filed this diversity action against nine defendants, including Bricolage, and petitioners Andersen and Curtis, alleging, *inter alia*, that in connection with allegedly faulty tax advice received by respondents: (1) all petitioners, together with

Bricolage, were jointly and severally liable for damages resulting from fraud and civil conspiracy, and (2) various petitioners, together with Bricolage, were also jointly and severally liable for damages resulting from alleged breach of fiduciary duty and negligence. Bricolage and petitioners filed motions to stay this litigation pending arbitration of disputes arising out of or relating to the investment-management agreements signed by Bricolage and the respondent LLCs. The district court denied Bricolage's motion as moot because Bricolage filed for bankruptcy while its motion was pending, and denied petitioners' motions on the grounds that (1) petitioners had not satisfied the requirements of equitable estoppel and thus could not enforce the arbitration agreements under ordinary principles of contract and agency law and (2) respondents' claims did not fall within the scope of the arbitration agreements. Petitioners appealed the denial of their motions to the Sixth Circuit under Section 16 of the FAA.

The Sixth Circuit dismissed petitioners' appeal for lack of jurisdiction on the ground that none of the petitioners was a signatory to the arbitration clause in question. *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, 521 F.3d 597 (6th Cir. 2008). Relying on recent decisions by the D.C.[2] and Tenth[3] Circuits, the Sixth Circuit rejected decisions by other

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[2] *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003).

[3] *In re Universal Service Fund Telephone Billing Practice Litigation*, 428 F.3d 940 (10th Cir. 2005).

Circuits[4] to hold that Section 16 confers jurisdiction over interlocutory appeals from the denial of a motion to stay only where the motion and appeal are brought by signatories to the arbitration agreement. In reaching this conclusion, the court construed Section 3, which "makes available a stay of proceedings based upon 'any issue referable to arbitration under *an agreement in writing* for such arbitration,'" to require that the party seeking the stay be a signatory to a written arbitration agreement also signed by the party against whom arbitration is sought. *Id.* at 600 (quoting 9 U.S.C. § 3) (emphasis added by Sixth Circuit). At least two things are clear from this decision: (1) the Sixth Circuit improperly conflated the determination of its appellate jurisdiction with the merits of the underlying motions that were the subject of the appeal; and (2) the Sixth Circuit interpreted the language "an agreement in writing" found in Section 3 to limit the protection of the FAA[5] to only those arbitration agreements actually signed by both the movant and the party against whom arbitration is sought.

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[4] *See, e.g., Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007); *Ross v. American Express Co.*, 478 F.3d 96 (2d Cir. 2007); *Waste Management, Inc. v. Residuos Industriales Multiquim, S.A.*, 372 F.3d 339 (5th Cir. 2004); *Long v. Silver*, 248 F.3d 309 (4th Cir.), *cert. denied*, 534 U.S. 894 (2001); *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994).

[5] This, or closely parallel, language is also found in Sections 2 ("written provision," "agreement in writing") and 4 ("written agreement") of the FAA. 9 U.S.C. §§ 2 & 4.

SUMMARY OF ARGUMENT

Petitioners ably demonstrate that the plain language of Sections 16 and 3 of the FAA provide clear answers to the questions on which certiorari was granted. Section 16 provides for interlocutory appeals over denials of motions to stay litigation under Section 3, with jurisdiction predicated on only two elements: (1) denial of (2) a motion to stay litigation under Section 3. 9 U.S.C. § 16. To add a signatory requirement, as the Sixth Circuit did below, both ignores the statutory language and improperly conflates the question of appellate jurisdiction with the merits of the interlocutory appeal. (Petr.'s Br. 19-27.) Similarly, Section 3 provides for a mandatory stay of litigation, where issues involved in that litigation are "referable to arbitration under an agreement in writing for such arbitration." 9 U.S.C. § 3. Neither the statutory language, purpose nor history of this provision supports the "signatory" limitation imposed by the Sixth Circuit.

But even if the statute were ambiguous, the strong federal policy favoring arbitration, together with its concomitant goal of protecting the freedom to contract for arbitration, would provide an additional reason for giving effect to the broad language of Section 3. Put another way, there is simply no good reason to engraft restrictive language into Section 3, which would limit its protections to only those who have actually signed the arbitration agreement in question. To the contrary, this unduly restrictive view of Section 3 discriminates against arbitration agreements by creating a "disfavored"

class of disputes and disputants, which prevents the enforcement of arbitration agreements for and against non-signatories.

Petitioners have ably presented the case for allowing a non-signatory, who can enforce the terms of a contract containing an arbitration clause, to enforce the arbitration clause in that contract. But the signatory-only limitation also adversely affects the arbitration rights of signatories who have bargained for arbitration of claims involving non-signatories, as well as those who are entitled to enforce the contract containing the arbitration clause against a non-signatory.

By focusing only on the lack of a signed agreement between the non-signatory and the signatory, the signatory-only limitation loses sight of the important federal policy of enforcing the arbitration agreement as defined by the original contracting parties, which may include claims involving non-signatories. As a result, the signatory limitation adopted by the Sixth Circuit upsets settled expectations of signatories, as well as those of non-signatories, based on rights bargained for before the dispute arose. This, in turn, undermines the fundamental FAA policy of freedom to contract for arbitration on terms defined by the parties, and it allows one signatory to avoid arbitration obligations after the fact by jointly suing non-signatories on claims against the other signatory. Thus, reversal is required not only by the plain language of the statute, but also for clear federal policy and prudential reasons.

ARGUMENT

I. STRONG FEDERAL POLICY FAVORING FREEDOM TO CONTRACT FOR ARBITRATION REQUIRES GIVING PLAIN LANGUAGE OF SECTION 3 ITS NATURAL BROAD CONSTRUCTION

Section 3 requires that litigation be stayed if it is brought upon "any issue referable to arbitration under an agreement in writing." The fundamental questions to be answered when faced with a motion to stay brought under Section 3 is not "who signed the written arbitration agreement originally executed by the signatories," but "what have the parties to that agreement agreed to arbitrate" and "do the claims involving non-signatories fall within its scope."[6] If the answer to these two questions is yes, the plain language of Section 3 requires that a stay be granted pending arbitration, even though the party bringing the motion was not a signatory to the arbitration agreement. *Cf. Perry v. Thomas*, 482 U.S. 483, 492 & n.9 (1987) (ordinary contract principles should determine "whether the arbitration provision inures to the benefit of appellants and may be construed, in light of the circumstances surrounding the litigants' agreement, to cover the dispute that has arisen between them").

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[6] *See Sherer v. Green Tree Servicing, LLC*, 548 F.3d 379, 381 (5th Cir. 2008); *accord Campbell v. General Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 552 (1st Cir. 2005) (requiring "that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause's scope") (internal quotations and citation omitted).

This approach is consistent with the core FAA policy of enforcing agreements to arbitrate, and it keeps the focus where it should be – on the terms and scope of the written arbitration agreement – not on the formalities of who signed the agreement. Like questions of arbitrability under Section 2, these questions should be answered by applying general principles of contract interpretation, applicable to all contracts, giving due regard to the federal policy favoring arbitration and resolving any ambiguity regarding the scope of the arbitration clause in favor of arbitration. *Volt*, 489 U.S. at 475-76.

A. The FAA Requires that Arbitration Agreements Receive the Same Protection as Other Agreements

The Court has consistently recognized in a long line of FAA decisions that the Act expresses a "liberal federal policy favoring arbitration agreements," which created "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24. These decisions also make clear that the primary Congressional concern was "to enforce private agreements into which parties had entered," and "to place an arbitration agreement 'on the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds*, 470 U.S. at 221 & 219 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. at 1, 2 (1924)); *accord Volt*, 489 U.S. at 478 (the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms").

At a minimum, this requires that arbitration agreements receive the same protection afforded other contracts and be construed under the ordinary principles of law and equity generally applicable to all agreements. *See, e.g., id.* at 475 (applying "general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act"); *Perry*, 482 U.S. at 492-93 (ordinary principles of "law and equity" apply to arbitration agreements governed by the FAA). And in *Perry*, although it did not decide the issue,[7] the Court recognized that these same principles apply to claims involving non-signatories. Providing guidance for consideration on remand of appellee's claim that, as non-signatories, appellants lacked "standing" to compel arbitration under Section 4, the Court characterized the issue as "a straightforward issue of contract interpretation: whether the arbitration provision inures to the benefit of appellants and may be construed, in light of the circumstances surrounding the litigants' agreement, to cover the dispute that has arisen between them." *Id.* at 492; *accord First Options, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("ordinary state-law principles that govern the formation of contracts" apply when deciding whether the parties, including non-signatories, have "agreed to arbitrate a particular matter").

Indeed, where the issue is arbitrability, or the scope of an arbitration clause, strong federal policy favoring arbitration requires *more*, not less,

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[7] The Court declined to decide this issue on the merits because it had not been decided by the lower courts. *Perry*, 482 U.S. at 492.

protection for arbitration agreements than may be afforded other agreements. For more than twenty-five years, the Court has recognized as much, consistently reiterating that the FAA establishes that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (in construing arbitration agreements, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability"). And in *Volt*, the Court reaffirmed that *Moses H. Cone* and *Mitsubishi* require that state-law principles of contract interpretation defer to the strong federal policy favoring arbitration:

> These cases of course establish that, in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, see *Perry v. Thomas* ..., due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.

Volt, 489 U.S. at 475-76; *see also First Options, Inc.*, 514 U.S. at 944-45 (affirming presumption in favor of arbitration when determining whether claims are arbitrable).

As petitioners have ably set forth, by focusing on who signed the written arbitration agreement, the Sixth Circuit failed to give arbitration provisions the same protections afforded other agreements under ordinary principles of law and equity. (Petr.'s Br. 31-36.) And at least in the context of Section 3, this decision sets up a restrictive approach that disfavors arbitration when considering the scope of the arbitration clause for claims involving non-signatories. By excluding all non-signatories from the scope of the arbitration agreement under Section 3 as matter of law, this *per se* rule flies in the face of the well-settled requirement that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25. Moreover, this *per se* rule interferes with the freedom to bargain for arbitration clauses that are defined broadly to encompass claims against non-signatories.

B. Liberal Federal Policy Favors Freedom of Contract in Arbitration Agreements

The Court has consistently underscored that the freedom to contract for arbitration, and not arbitration for its own sake, is at the heart of the strong federal policy favoring arbitration. As the Court reiterated just last Term, the FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston*, 552 U.S. at __, 128 S. Ct. at 981. Fundamental to this national policy of freedom to contract for arbitration is enforcement of the obligation to arbitrate: the FAA "supplies not simply

a procedural framework applicable in federal courts," *id.*; it also "creates federal substantive law requiring parties to honor arbitration agreements." *Southland Corp.*, 465 at 15 n.9; *see also Preston*, 552 U.S. at __ & n.2, 128 S. Ct. at 983 & n.2 (reaffirming *Southland*); *Circuit City Stores v. Adams*, 532 U.S. 105, 122 (2001) (same); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 270-72 (1995) (same).

That the freedom to contract for arbitration is the crux of the national policy favoring arbitration is underscored by the Court's consistent view that the FAA requires enforcement of the bargain struck by the parties. *See, e.g., Preston*, 552 U.S. __, 128 S. Ct. 978; *Circuit City Stores, Inc.*, 532 U.S. 105; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Volt*, 489 U.S 468; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi*, 473 U.S. 614; *Dean Witter*, 470 U.S. 213. A necessary corollary to the freedom of contract is the parties' understanding that contract rights will be enforced according to settled expectations so that each party can enjoy the benefits of their bargain while being held to its terms. By limiting the protections of Sections 3 and 16 of the FAA to parties who actually signed the written arbitration agreement, the decision below impedes the freedom to contract for arbitration of disputes involving related claims against non-signatories.

II. SIGNATORY-ONLY LIMITATION FRUSTRATES THE PURPOSES OF THE FAA

Section 3 mandates a stay of litigation brought upon "any issue referable to arbitration under an agreement in writing." 9 U.S.C. § 3. Consistent with the strong federal policy favoring the enforcement of agreements to arbitrate, the question whether an issue involving a non-signatory is "referable to arbitration" should be decided by reference to the written arbitration agreement executed by the signatories, which is claimed to cover the dispute. As suggested by the *Perry* Court in the context of Section 4, this arbitration agreement should be interpreted according to ordinary principles of law and equity with due regard to the presumption favoring arbitration that generally applies to questions of arbitrability. *Perry*, 482 U.S. at 492 & n.9. In each case where this agreement covers claims involving non-signatories, or where non-signatories are otherwise subject to its terms under ordinary principles of law and equity, this written contract is the source of the right to arbitrate claims involving non-signatories.

By imposing a signatory-only limitation on the plain language of Section 3, the Sixth Circuit has precluded enforcement of arbitration agreements that are expressly defined to cover claims involving non-signatories, as well as those that otherwise cover non-signatories under ordinary principles of law and equity. Where the parties have agreed to an arbitration clause broad enough to cover such claims, the core federal policy of enforcing

agreements to arbitrate reflected in Sections 3 and 4 should be available to hold the parties to their bargain regardless of whether the non-signatory could independently enforce or be held to the terms of that agreement.[8]

A. Signatory-Only Limitation Frustrates Freedom to Contract for Defined Arbitration Terms

Perhaps the most glaring problem with engrafting a signatory-only limitation into Sections 3 and 4 is that it would seem to preclude enforcement of even an express written agreement to arbitrate claims involving non-signatories. For example, the parties could agree to the following arbitration clause expressly covering non-signatories:

> Any dispute against a non-signatory, which (1) is substantially similar to (or connected with) issues raised in, or (2) arises out of

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[8] Even if a non-signatory could not be compelled to arbitrate under such an agreement, it should have "standing" to bring a motion to stay or compel under Section 3 or 4 because the clause covering arbitration of claims involving non-signatories inures to its benefit. *See, e.g., Waste Management, Inc.*, 372 F.3d at 342-43 (grammatical structure of § 3 gives any party to suit standing to apply for mandatory stay, which must be granted if claim at issue is covered by arbitration agreement); *cf. Perry*, 482 U.S. at 492 & n.9 (suggesting that non-signatory has standing where arbitration inures to its benefit and may be reasonably construed to cover its claims). The status of a non-signatory as either the movant or the person against whom arbitration is sought makes a difference regarding whether a motion to compel will be granted. *See, e.g., Comer*, 436 F.3d at 1102 (third-party beneficiary may have power to sue under contract, but cannot be bound to contract it did not assent to).

> substantially the same facts as, a dispute subject to arbitration under this Agreement, shall be subject to arbitration together with related disputes under this Agreement, or if a non-signatory cannot be compelled to arbitrate, shall be stayed pending arbitration of such related disputes.

Obviously, if the agreement expressly provides for arbitration (or deferral) of claims involving non-signatories, the core FAA policy of liberally enforcing arbitration agreements mandates that the protections of the Act for enforcement of this obligation should be available, and the plain terms of Section 3 are broad enough to do so. But due to the lack of an agreement signed by the non-signatory, the decision below would seem to preclude FAA enforcement of even this arbitration agreement with its unequivocal expression of the parties' intention to arbitrate, or at least defer, related claims involving non-signatories.

Such a detailed expression of intent to cover non-signatories is neither required nor practicable in the context of many commercial transactions. *See* 2 Ian P. MacNeil et al., *Federal Arbitration Law: Agreements, Awards, and Remedies Under the Federal Arbitration Act* § 17.7.3, at 17:92 (1999) (noting that informal requirements of the FAA conform to the widespread informal nature of routine and ordinary business practices). Where, as here, the agreement's terms do not expressly state whether a signatory may be compelled to arbitrate with a non-signatory, ordinary principles of contract and agency law, including

equitable estoppel,[9] should be applied to determine whether claims by or against non-signatories are "referable to arbitration" within the meaning of Section 3. And consistent with analysis of arbitrability under Section 2, application of these principles must give due regard to the federal policy favoring arbitration, resolving any ambiguity in favor of arbitration.

For example, a broad arbitration clause covering any claims, including those involving relationships, arising out of or relating to the agreement would likely be interpreted to cover related claims involving non-signatories. This was the case recently in *Sherer v. Green Tree Servicing, LLC*, 548 F.3d 379 (5th Cir. 2008). In *Sherer*, the plaintiff borrower executed a loan agreement with the lending bank, which included an arbitration clause covering "[a]ll disputes, claims, or controversies arising from or relating to this Agreement or the relationships which result from this Agreement."

The Fifth Circuit held that the defendant loan servicer, who was not a party to the original loan agreement containing the arbitration clause, was entitled to compel arbitration because the borrower had expressly agreed to arbitrate any claims arising from "the relationships which result from th[e]

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[9] Although often overlapping in their application, other contract theories that provide these rights or obligations to non-signatories include: (1) alter-ego and corporate-veil piercing; (2) incorporation by reference; (3) assumption by conduct; (4) agency; (5) successors in interest; and (6) third-party beneficiary. *See* DiLeo, *The Enforceability of Arbitration Agreements By and Against Nonsignatories*, 2 J. Am. Arb. 31 (2003).

Agreement," and the defendant loan servicer for the underlying loan was just such a relationship. *Id.* at 383; *see also Vigil v. Sears National Bank*, 205 F. Supp. 2d 566, 568 (E.D. La. 2002) (arbitration clause covering "any relationships resulting from this agreement" encompasses claims against non-signatory). This result would be foreclosed if the signatory-only rule applied by the Sixth Circuit were adopted – regardless of how clearly the parties had contracted for arbitration (or deferral) of claims involving non-signatories.

Keeping the focus on the written arbitration agreement, while applying ordinary principles of law and equity generally applicable to all contracts, assures that arbitration agreements, like other contracts, will be enforced according to settled expectations. This, in turn, allows each party to enjoy the benefits of its bargain while being held to its terms. Applying the presumption favoring arbitration consistently applied when ascertaining the scope of an arbitration clause also conforms to these expectations and allows the parties to enjoy the full benefits of their agreement to arbitrate.

And perhaps most important, this approach leaves in the hands of the parties, at the time of contracting, the freedom to define the scope of their arbitration agreement. The parties are free to expressly narrow the scope of their agreement by excluding non-signatories from arbitration, even where ordinary contract principles might provide otherwise. *See, e.g.*, *Mastrobuono*, 514 U.S. at 53 (FAA requires enforcement of parties' bargain even where it includes punitive damages otherwise prohibited by

law of state designated in contract choice-of-law provision); *Dean Witter Reynolds*, 470 U.S. at 217 (FAA requires enforcement of parties' bargain even where enforcement results in inefficient use of judicial system).

In contrast, focus on the non-signatory status of the movant and concern over whether the non-signatory had itself bargained for arbitration rights,[10] which are central to the signatory-only approach adopted below, distract from the key question – whether the claims involving the non-signatory are "referable to arbitration" under the written arbitration agreement executed by the parties to that agreement.

B. Signatory-Only Limitation Fails to Appreciate Realities and Settled Expectations in Complex Commercial Transactions

As petitioners point out, a signatory-only rule fails to appreciate that, under generally-accepted principles of contract or agency law, non-signatories may enforce and be bound by written agreements executed by third parties. (Petr.'s Br. 31-36.) These generally-accepted principles form the understanding of contracting parties in complex commercial relationships involving multiple parties with interconnected roles. The non-signatory

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[10] These factors are important when a signatory seeks to compel arbitration against a non-signatory, even where the arbitration clause expressly covers claims involving non-signatories, because parties generally cannot bind a third party to an agreement without its knowledge or consent. *See, e.g., Comer*, 436 F.3d at 1102.

agreements may incorporate by reference the primary contract, there may be indemnification requirements between the signatory and non-signatories, or there may be agency or third-party beneficiary relationships among the entities that entitle them to enforce or bind them to the terms of the primary contract.

For example, where two parties execute a primary contract, which anticipates the use of non-signatory subcontractors, insurance or performance-bond providers, or other entities providing services related to the primary contract, these non-signatories may be entitled to enforce or be bound by the terms of the primary contract under ordinary principles of agency or contract law. These complexities are illustrated by *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) ("ABS"). In *ABS*, the shipowners executed a construction contract with a shipbuilder to build a yacht, which required, *inter alia*, that the yacht be "classed" according to ABS standards. The shipbuilder contracted with ABS to provide the required classification, and this agreement contained an arbitration clause. After delivery, the yacht suffered hull damage allegedly due to poor construction and defective design, and the underwriters indemnified the owners pursuant to their performance-bond obligations. Facing claims by the owners, shipbuilder, and underwriters, ABS sought to compel arbitration against all three under the arbitration clause in its classification contract with the shipbuilder.

The Second Circuit applied ordinary principles of contract and agency law to hold that (1) the non-signatory owners could be compelled to arbitrate because the construction contract required, and they received a direct benefit from, the ABS classification contract that contained the arbitration clause; and (2) the underwriters could also be compelled to arbitrate because, as insurer-subrogees, they stood in the shoes of the owners. *Id.* at 353; *accord Interbras Cayman Co. v. Orient Victory Shipping Co., SA*, 663 F.2d 4, 6 (2d Cir. 1981) (undisclosed principal may enforce contract made for its benefit by agent).

Similarly, in *Bartley v. Jefferson Parish School Board*, 302 So.2d 280 (La. 1974), a primary contractor sued one of its subcontractors and the school board building owner to compel arbitration of a dispute arising out of the primary contract between the prime contractor and the owner. Although not a signatory to the primary contract, the subcontractor was compelled to arbitrate under the arbitration provision of that contract because its subcontract incorporated by reference the terms of the primary contract. *Id.* at 281; *accord Ventura Maritime Co. v. ADM Export Co.*, 44 F. Supp. 2d 804, 807 (E.D. La. 1999) (holding non-signatory bound to arbitrate where it provided services linked under general principles of contract or agency law to bill of lading containing arbitration clause); *cf. AgGrow Oils, LLC v. National Union Fire Insurance Co.*, 242 F.3d 777 (8th Cir. 2001) (where primary contract expressly disavowed intention to create contractual relationship with third parties and performance bond referenced judicial resolution of disputes,

incorporation clause in performance bond found not to incorporate arbitration obligations of primary contract).

Contrary to the purposes of the FAA, a *per se* signatory requirement discriminates against arbitration clauses in these complex commercial transactions because the non-signatories may be entitled to enforce or be bound by all provisions in the primary contract save the arbitration clause. Moreover, a *per se* signatory requirement fails to appreciate the understood realities of these complex commercial undertakings or to take into account settled expectations regarding the scope of an arbitration clause in the primary contract broadly covering any related disputes.

C. Equitable Estoppel, as Traditionally Applied to All Contracts, Should Apply to Arbitration Agreements

Like the contract theories discussed above, equitable estoppel principles should be applied to enforce arbitration agreements in the same manner as other contracts. This doctrine, applied traditionally, can be used to compel arbitration by or against a non-signatory. For example, where a non-signatory has invoked, taken advantage of, or asserted rights under a contract with an arbitration clause, traditional principles of law and equity bind the non-signatory to that contract's arbitration provisions as well. This prevents a party, who knowingly exploits an agreement, from taking advantage of the benefits of the contract while simultaneously disavowing its burdens. *See, e.g.*,

Long, 248 F.3d at 320-21 (holding signatory bound to arbitrate claims against non-signatories because contract benefits of shareholder status and right to continued employment cannot be asserted against non-signatories while "simultaneously attempting to avoid the terms of an arbitration provision contained therein'"); *International Paper Co. v. Schwabedissen Maschinen & Angalen, GMBH*, 206 F.3d 411 (4th Cir. 2000) (holding non-signatory bound to arbitrate because it cannot claim the benefit of the contract and simultaneously avoid its burdens); *Deloitte Noraudit, A/S v. Deloitte, Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993) (holding non-signatory bound to arbitrate when it knew of the arbitration agreement and "knowingly accepted the benefits of" that agreement through continuing use of tradename covered by agreement). By limiting enforcement of a broad arbitration clause in such agreements, the signatory-only limitation discriminates against arbitration and upsets settled expectations of the parties.

Clearly, any right to stay litigation or compel arbitration must be based on the written agreement containing the arbitration clause – the parties can choose not to arbitrate at all or to limit arbitration even if it results in inefficient use of the judicial system. *Dean Witter Reynolds*, 470 at 217. Accordingly, courts should not compel arbitration based merely on general policy goals, but must look first to whether the parties agreed to arbitrate disputes involving non-signatories, applying general principles of law and equity with due regard for the federal policy favoring arbitration. *See, e.g., Circuit City Stores*, 535 U.S. 105; *EEOC v. Waffle House*,

Inc., 534 U.S. 279, 294 (2002). If the written arbitration agreement between the original contracting parties covers claims involving non-signatories, the non-signatory can directly enforce this agreement under Sections 3 and 4 of the FAA. If the arbitration clause does not cover claims involving non-signatories, the mandatory protections of Sections 3 and 4 are not available, even if this results in the inefficient resolution of related claims in different forums.[11] *Dean Witter Reynolds*, 470 U.S. at 217.

* * * * *

In sum, Section 3 requires that litigation be stayed if it is brought upon "any issue referable to arbitration under an agreement in writing." 9 U.S.C. § 3. Consistent with federal common law requiring enforcement of arbitration agreements, whether an issue involving a non-signatory is "referable to arbitration" should be decided by reference to the written arbitration agreement executed by the signatories, which is claimed to cover the dispute. This agreement should be interpreted according to ordinary principles of law and equity, with due regard given to the federal policy favoring arbitration, and any ambiguity as to the scope of the arbitration clause resolved in favor of arbitration. If an arbitration agreement covers

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[11] Instead, district courts have the inherent power to grant a discretionary stay where the litigation involves common questions of fact that are within the scope of a pending arbitration and a stay is necessary to further the strong federal policy favoring arbitration. *See, e.g.*, *AgGrow*, 242 F.3d at 782-83; *Citrus Marketing Board of Israel v. Lauritzen A/S*, 943 F.2d 220, 225 (2d Cir. 1991).

claims involving non-signatories, the plain language of Section 3 requires that a stay be granted, even where the party bringing the motion was not a signatory to the arbitration agreement. The signatory-only limitation adopted below fails to give effect to the plain language and purpose of Section 3, and discriminates against arbitration by refusing to apply ordinary contract principles to enforce arbitration agreements. As such, it upsets the settled expectations of both signatories and non-signatories, based on rights bargained for before the dispute arose, interferes with freedom to define the terms of arbitration by contract, and fails to appreciate the complexity of many commercial disputes.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ARTHUR ANDERSEN L.L.P., ET AL.,
Petitioners,

v.

WAYNE CARLISLE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE SIXTH CIRCUIT ERRONEOUSLY CREATED TWO CLASSES OF LITIGANTS WHO ARE ENTITLED TO ARBITRATION 4

II. THIS COURT HAS SUGGESTED THAT NON-SIGNATORIES MAY BE ABLE TO UTILIZE SECTION 4 IF CONTRACT LAW SUPPORTS AN ENTITLEMENT TO ARBITRATION 8

III. THE TEXT AND HISTORY OF THE FAA, AS WELL AS THE STRONG FEDERAL PRO-ARBITRATION POLICY, SUPPORT PROTECTIONS FOR NON-SIGNATORIES UNDER THE ACT 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

DSMC Inc. v. Convera Corp.,
349 F.3d 679 (D.C. Cir. 2003) 4, 7
Denney v. BDO Seidman, L.L.P.,
412 F.3d 58 (2d Cir. 2005) 4
EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 10
Ehleiter v. Grapetree Shores, Inc.,
482 F.3d 207 (3d Cir. 2007) 10
Grigson v. Creative Arts Agency, L.L.C.,
210 F.3d 524 (5th Cir. 2000) 5
Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.,
659 F.2d 836 (7th Cir. 1981) 5
Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,
206 F.3d 411 (4th Cir. 2000) 5
JLM Indus. v. Stolt-Nielsen SA,
387 F.3d 163 (2d Cir. 2004) 5
MS Dealer Serv. Corp. v. Franklin,
177 F.3d 942 (11th Cir. 1999) 5
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 5
Perry v. Thomas, 482 U.S. 483 (1987) 8, 9
Ross v. Am. Express Co.,
547 F.3d 137 (2d Cir. 2008) 12
Ross v. Am. Express Co.,
478 F.3d 96 (2d Cir. 2007) 12
In re Universal Serv. Fund Tel. Billing Practice Litig. v. Sprint Commc'ns Co., L.P.,
428 F.3d 940 (10th Cir. 2005) 4

TABLE OF AUTHORITIES

Page

Statutes

9 U.S.C. § 3 ..... *passim*
9 U.S.C. § 4 ..... *passim*
9 U.S.C. § 16 ..... *passim*

Other Cases

Dow Chem. Group v. Isover-Saint-Gobain (ICC Case No. 4131) (1982) (France) 5
Y. S.A.L. v. Z. Sarl (ATF 129 III 727) 115/2003 (Switzerland) 5

Miscellaneous

Michael A. Rosenhouse, *Application of Equitable Estoppel by Nonsignatory to Compel Arbitration – Federal Cases*, 2006, A.L.R. Fed. 2d 18 (2006) 6
Contracts (Rights of Third Parties) Act 1999, Chapter 31 (U.K.) 5
Martin Domke, *Domke on Commercial Arbitration: The Law and Practice of Commercial Arbitration* Vol. 1 (2008) 5, 6

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C. with supporters nationwide. WLF seeks to strengthen the free enterprise system and protect the economic and civil liberties of individuals and businesses. WLF has devoted substantial resources to promoting civil justice reform and freedom of contract. It has published numerous monographs and other educational materials on issues relating to alternative dispute resolution.

WLF believes that the decision of the United States Court of Appeals for the Sixth Circuit undermines the sound policies of the Federal Arbitration Act ("FAA" or "Act"). If left intact, the decision will impose substantial costs on numerous individuals and entities who voluntarily seek to resolve disputes through arbitration. In addition, the decision will impede and potentially deny a host of parties the ability to utilize alternative dispute resolution mechanisms when the governing law would otherwise entitle them to such procedures.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief; letters of consent have been lodged with the Court.

These increased costs will ultimately be borne by consumers and society as a whole. WLF thus brings a broader perspective to the issues in this case than the parties. For the reasons set forth below, WLF urges the Court to reverse the decision of the Sixth Circuit.

SUMMARY OF THE ARGUMENT

In domestic and international commerce, countless parties depend upon the availability of arbitration as a means for controlling costs, streamlining processes, and lending certainty to contractual relationships. Congress and the federal courts have recognized the important public values inherent in arbitration and decidedly and affirmatively have acted to support these policies. The court of appeals erred and contravened these important pro-arbitration policies by imputing a non-existent requirement that only signatories to an agreement may invoke certain provisions of the FAA. The court's decision effectively creates two classes of parties to contractual relationships: those who had the good fortune of signing the document that contains the arbitration provision at issue and all other parties who may invoke the provision under state, federal or international law but who did not actually sign the agreement. Under the court of appeals's reasoning, entities and individuals in the latter group, such as Petitioners, have little ability to rely upon the Act or avail themselves of the strong federal policy supporting arbitration. Similarly, if a signatory seeks to compel a non-signatory to arbitrate, it would have no recourse under the Act.

As Petitioners have explained in their brief, the court of appeals erred by reading a de facto

standing requirement of signatory status into the FAA's appellate jurisdiction provision, Section 16, which does not exist in the statute. It further impermissibly reached the merits of the claim in the name of determining appellate jurisdiction. And, it countermanded the intent of Section 16, which was to give immediate appellate recourse to a party wrongfully denied the opportunity to arbitrate. The court of appeals also imputed a signatory requirement into Section 3 which would prevent non-signatories from enforcing arbitration agreements under Section 3 (and by implication Section 4). As a result, under the court's decision, parties who sign agreements with arbitration provisions and parties who can enforce or be bound to such agreements but have not signed are treated differently – the former receiving preferential treatment, added benefits under the FAA and expedited appellate review, while the latter are consigned to potential deprivation of the arbitration provisions to which they are entitled.

Neither the plain language of the Act nor the strong public policies that underlie it support this result. This Court should affirm the strong federal policy present in the FAA, hold that Section 16 and, if necessary, Section 3, is available to *any* party that is entitled invoke arbitration provisions existing under the agreement at issue, and reverse the court of appeals's decision.

ARGUMENT

I. THE SIXTH CIRCUIT ERRONEOUSLY CREATED TWO CLASSES OF LITIGANTS WHO ARE ENTITLED TO ARBITRATION.

The Sixth Circuit held that it lacked appellate jurisdiction under Section 16(a)(1) because the Petitioners were not signatories to the underlying arbitration agreement, and therefore, had failed to state a cognizable request for stay under Section 3 of the Act. Pet. App. 10a. Relying on *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003), and *In re Universal Service Fund Telephone Billing Practice Litigation v. Sprint Communications Co., L.P.*, 428 F.3d 940 (10th Cir. 2005), the court concluded that Section 16(a)(1) conferred appellate jurisdiction only in the circumstance where the appellant brought a motion under Section 3 of the Act and that only signatories to the contract containing the arbitration provision could be parties to a dispute covered under Section 3 (and by implication Section 4) of the Act. Pet. App. 5a-11a. Petitioners' Brief amply explains why the court of appeals erred in this holding.

Amicus writes separately, however, to identify the pernicious effect that the rule adopted by the court of appeals would have upon a host of parties who are otherwise entitled to arbitration under state, federal, or international law but could be effectively denied that right under the court of appeals's decision.

State and federal courts have recognized a number of theories under which non-signatories can invoke or be bound to arbitration provisions including agency, incorporation by reference, alter ego, implied conduct, estoppel, third-party

beneficiary status, and successors in interest.[2] *See* Martin Domke, *Domke on Commercial Arbitration: The Law and Practice of Commercial Arbitration* Vol. 1, § 13 ("Domke") (2008). International law also provides that, in certain circumstances, non-signatories are bound by or can enforce arbitration provisions.[3] Yet each of these parties, entitled by law to arbitration, could

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[2] *Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58, 70 (2d Cir. 2005) ("[S]ignatories to an arbitration agreement can be compelled to arbitrate their claims with a non-signatory where 'a careful review of the relationship among the parties, the contracts they signed . . . , and the issues that had arisen among them discloses that the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'") (quoting *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000) ("Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties."); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (developing two independent bases upon which non-signatories can compel arbitration with a signatory to the contract); *Grigson v. Creative Arts Agency, L.L.C.* 210 F.3d 524, 527 (5th Cir. 2000) (approving the "intertwined-claims" test formulated by the Eleventh Circuit and affirming the district court order compelling arbitration); *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 841 n.9 (7th Cir. 1981).

[3] *See Dow Chem. Group v. Isover-Saint-Gobain* (ICC Case No. 4131) (Dow Chemical) (1982) (France); *Y. S.A.L. v. Z Sarl* (ATF 129 III 727) 115/2003 (Switzerland); *see also* Contracts (Rights of Third Parties) Act 1999, Chapter 31 (U.K.). This Court has affirmed the application of the Act to transactions involving international commerce and trade. *See, e.g., Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.* 473 U.S. 614, 638-40 (1985).

not invoke the Act in aid of arbitration under the court of appeals's decision. As a result, a panoply of parties – acquirers, owners, parent and subsidiary companies, investors, affiliates, guarantors, lenders, customers, licensees, employees, officers, directors, agents, brokers, administrators, and trustees – could be consigned to years of litigation before the right to arbitrate is recognized. *See* Michael A. Rosenhouse, *Application of Equitable Estoppel by Nonsignatory to Compel Arbitration – Federal Cases*, 2006 A.L.R. Fed. 2d 18 (2006). For example, the appeals court's decision would bar minors from seeking recourse under the FAA because minors cannot contract in many jurisdictions due to issues of capacity and thus are not signatories. Nevertheless, minors are often entitled to invoke provisions in contracts for which they are third-party beneficiaries.[4] Non-signatories thus include both intended beneficiaries who can enforce the signatory's contract as well as parties against whom the signatory has alleged substantially interdependent and concerted misconduct.[5]

Not only would the court of appeals's decision frustrate the expectations of many third parties, it would equally affect parties to the contract. Under the court of appeals's reasoning and that used by the court in *DSMC Inc.*, a valid appeal requires

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[4] Domke, § 13.11.

[5] Those consigned to "non-signatory" status by the appeals court could include parties who did not execute the agreement but are bound to its terms through assignment by the original signatory, such as a successor in interest following a merger.

signatories on both sides of the dispute.[6] Thus, even if the moving party is a signatory, the presence of a non-signatory as the non-moving party could defeat appellate jurisdiction. Given the number of state-law doctrines that can obligate non-signatories to arbitrate under a written agreement, and the FAA Section 2 requirement that interpretation of arbitration agreements should be guided by generally applicable contract law, *see* Pet. Br. at 4-5, 31-36, it is an unduly narrow interpretation that excludes such claims from the reach of the FAA.

In effect, the Sixth Circuit's decision would create two classes of litigants entitled to arbitration. For those who signed the agreement at issue and wish to invoke it against another signatory, assistance under the Act is substantial. The tools in both Section 3 and Section 4 would be available and, if arbitration is found to be warranted, the immediate reference would take place free from the potential of interlocutory appeal. *See* 9 U.S.C. §§ 3, 4, and 16 (b). For those parties entitled to arbitration but who are non-signatories, or those who are trying to enforce arbitration against a non-signatory, the road is more arduous, harkening back to the pre-Act regime where arbitration was disfavored. For the multitude of situations where this occurs, there would be no mandatory stay under Section 3, no

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[6] The court of appeals reached its decision by relying on the decision in *DSMC Inc.* wherein the court articulated a test for appellate jurisdiction which "ask[ed] whether the parties [to the suit] are signatories to a written agreement to arbitrate." *DSMC Inc.*, 349 F.3d at 683. Thus, not only must the appellant be a signatory to appeal under Section 16, the appellee must be as well.

order to compel under Section 4, and no expedited appeal under Section 16.

II. THIS COURT HAS SUGGESTED THAT NON-SIGNATORIES MAY BE ABLE TO UTILIZE SECTION 4 IF CONTRACT LAW SUPPORTS AN ENTITLEMENT TO ARBITRATION.

This Court has not directly reached the question of whether the FAA is available to non-signatories. In *Perry v. Thomas*, 482 U.S. 483 (1987), however, this Court did suggest that the protections of the Act could be available to non-signatories if applicable contract principles would support such an exercise. There, the plaintiff brought an action against his former employer and two former co-workers, alleging wrongdoing in conjunction with the sale of securities. The co-workers sought arbitration under Sections 2 and 4 of the Act, and the employer joined the request, citing a provision in the plaintiff's employment contract. 482 U.S. at 485.

The plaintiff argued that the co-workers, as non-signatories to his employment agreement, "lacked standing" to enforce the arbitration provision. *Id.* at 488. This Court declined to consider that argument on the merits because it had not been decided by the lower courts. *Id.* at 492. In remanding, the Court characterized the issue as a "straightforward issue of contract interpretation: whether the arbitration provision inures to the benefit of appellants and may be construed, in light of the circumstances surrounding the litigants' agreement, to cover the dispute that has arisen between them." *Id.*

If, as suggested by the Sixth Circuit, non-signatories could not invoke either Section 3 or Section 4, then the co-workers' request for an

order compelling arbitration under Section 4 in *Perry* would not have required a "straightforward issue of contract interpretation" but a short order denying the co-workers the ability to seek arbitration under Section 4. Nor would it have been a decision on "whether the arbitration provision inures to the benefit of appellants" but rather a threshold conclusion that irrespective of that entitlement to arbitration, Section 4 provides no remedy.

It suffices to say that this Court did not indicate that the non-signatory co-workers had no ability to utilize Section 4. In fact, the *Perry* decision gave some guidance as to which law to apply upon remand in considering this issue. *See id.* at 492, n.9. Although the Court did not conclude that the co-workers could pursue arbitration, it discussed how that decision would be made and, notably, the Court never suggested that the co-workers would not be entitled to a Section 4 remedy by virtue of their status as non-signatories.

III. THE TEXT AND HISTORY OF THE FAA, AS WELL AS THE STRONG FEDERAL PRO-ARBITRATION POLICY, SUPPORT PROTECTIONS FOR NON-SIGNATORIES UNDER THE ACT.

Under the Sixth Circuit's decision, disfavored parties would be cast into what one court has called a "worst case scenario" in which "vindication of the litigant's contractual right to arbitrate would come only after he had been forced to expend substantial time and expense fully litigating the matter in court, which is precisely what he sought to avoid in the first place by bargaining for the speedy and efficient dispute

resolution procedure that the arbitral forum offers." *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 214 (3d Cir. 2007).

As Petitioners have explained, Pet. Br. at 17-18, 38-39, neither Section 16 nor Section 3 has any language that explicitly or implicitly requires both appellant and appellee (in the case of Section 16) or the moving and non-moving party (in the case of Section 3) to be signatories to the underlying contract. The plain language of each statute makes no such differentiation, and implying such a standing qualification is contrary to the broad public policy supporting arbitration provisions as an alternative mechanism to litigation. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (reading the Act to "manifest a liberal federal policy favoring arbitration agreements.") (quotation omitted); *Ehleiter*, 482 F.3d at 214 ("In no uncertain terms, Section 16 makes clear than any order favoring litigation over arbitration is immediately appealable and any order favoring arbitration over litigation is not. By prohibiting interlocutory appeals of orders favoring arbitration, Section 16 relieves the party entitled to arbitrate of the burden of continuing to litigate the issue while the arbitration process is on-going, and it entitles that party to proceed immediately to arbitration without the delay that would be occasioned by an appeal of the District Court's order to arbitrate.") (citations and internal quotation marks omitted).

There is no doubt that the Act in general and the pro-arbitration mechanisms found in Section 3, Section 4, and Section 16, in particular, advance the strong federal public policy of favoring arbitration over litigation where a written agreement so provides. If a rule denies a class of

parties the ability to use these federal tools in aid of arbitration, then the rule necessarily conflicts with the federal policy. The Sixth Circuit's decision does exactly that. It categorically denies a host of commercial and individual parties the ability to utilize the Act to support valid claims of arbitrability under state, federal, and international law.

The rule announced by the court of appeals would assign non-signatories to a class of litigants that would not be able to seek stays under Section 3, to file motions to compel under Section 4, to file immediate appeal under Section 16(a), or to seek protection from appeal under Section 16(b), despite the fact that these parties are entitled to obtain arbitration under the written agreement at issue. Nor is there is anything in the legislative history or commentary that accompanies the Act that suggests it should be construed narrowly or its benefits denied to third parties to an agreement that would otherwise be entitled to arbitration. In fact, if Section 16 and the Act are to advance the federal policy, the court of appeals should have reached the opposite result. Parties consigned to years of federal litigation may well choose to settle rather than endure the litigation burdens they were contractually entitled to avoid. A straightforward interpretation of Section 3 and Section 16 that does not discriminate on the basis of signatory status, on the other hand, reaffirms the important federal policy and accords equal treatment to all those who, under well-established contract law, have a basis for seeking arbitration.

It also fosters the prompt and efficient resolution of such claims.[7]

The smooth functioning of commerce and contractual relations requires the fulfillment of settled expectations regarding relationships and the way disputes will be resolved. Many non-signatories depend on arbitration provisions for the efficient administration of commercial and personal relationships. Adoption of the rule advocated by the Sixth Circuit would relegate a host of parties entitled to arbitration under applicable law into a litigation limbo where established rights to arbitrate are potentially vindicated only after a lengthy and costly litigation is completed. Indeed, the specter of duplicative processes may cause many to abandon contractual rights to arbitration.[8] Amicus respectfully requests this Court to reaffirm the strong pro-arbitration policy, hold that Section 16 confers appellate jurisdiction even where non-signatories are involved, and if necessary, hold

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[7] One case demonstrates the prompt resolution that can occur when non-signatories are permitted to assert arbitration claims. In *Ross v. American Express Co.*, 478 F.3d 96, 99 (2d Cir. 2007), the court of appeals held that it had jurisdiction over the appeal from denial of a non-signatory's request to arbitrate, but in relatively quick order held that the claim for arbitration was without merit. *See Ross v. American Express Co.*, 547 F.3d 137, 148 (2d Cir. 2008). In contrast, under the Sixth Circuit's approach, it would be years before a non-signatory party could obtain post-trial appellate review of a district court denial of an arbitration claim, no matter how meritorious.

[8] Given that one of the purposes of arbitration is to avoid litigation altogether, it is hollow comfort to affirm the ability to arbitrate after a case has been litigated in the trial court to its conclusion.

that Section 3 and Section 4 of the Act are not limited to disputes between signatories.

CONCLUSION

Amicus respectfully requests the Court to reverse the decision of the United States Court of Appeals for the Sixth Circuit.

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